Supreme Court, U.S.
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No. 09-820

In The

Supreme Court of the United States

MARY D. SHARP,

Petitioner,

vs.

UNITED STATES OF AMERICA,
on its own behalf and as trustee
on behalf of the Lummi Nation, and
THE LUMMI NATION,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

As a matter of federal law, the boundary on navigable waters between uplands and tidelands is ambulatory in nature. Upland owners have a common law right to build shore defense structures on their property to protect against erosion.

Section 10 of the Rivers and Harbors Appropriation Act of 1899 (RHA) prohibits the "creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States." It also makes it unlawful to "build or commence the building of any . . . structures in", or "to excavate or fill, or in any manner to alter or modify," navigable waters of the United States without a permit from the Army Corps of Engineers.

Submerged lands underlying navigable waters within territories of the United States are presumed to be held by the United States in trust for future states, which generally acquire such lands by virtue of their sovereignty upon achieving statehood. Nevertheless, Congress may withhold specific submerged lands from a future state by using plain language demonstrating intent to withhold them.

The questions presented are:

1. As a matter of federal law, when owners of real property abutting navigable waters lawfully erect a shore defense structure on their own uplands, does the shore defense structure constitute a trespass

QUESTIONS PRESENTED FOR REVIEW – Continued

against the tideland owner if subsequent erosion causes the mean high water line to contact the seaward face of that shore defense structure?

2. As a matter of federal law, does an owner of tidelands underlying navigable waters have a vested right to the unabated erosion of abutting uplands as they would exist in their natural state – a right that is superior to the upland owner's right to erect shore defense structures?

3. Is an owner of upland property strictly liable under Section 10 of the RHA for erecting a shore defense structure without a federal permit when, at the time of its original construction, the shore defense structure was erected entirely out of navigable waters of the United States?

4. Is injunctive relief under the RHA exempt from the general requirement that courts balance competing equitable interests before issuing an injunction?

5. Is the general disclaimer in the Washington Enabling Act that disclaims title to "all lands lying within [the state] owned or held by an Indian or Indian tribes" sufficient to demonstrate the requisite Congressional intent to overcome the presumption that tidelands are held in trust for the State of Washington?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

The parties in the Court below include Keith and Shirley A. Milner, Ian Bennett and Marcia Boyd, Brent and Mary K. Nicholson, Harry Case, Donald and Gloria Walker and petitioner here, Mary D. Sharp.

Respondents, the United States and the Lummi Indian Nation, were plaintiff and intervenor-plaintiff, respectively, in the proceeding below.

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OPINIONS BELOW

The opinion below was issued by the United States Court of Appeals for the Ninth Circuit. It is reported as *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009) and is reprinted beginning at Appendix (App.) 1. The panel upheld a series of unreported summary judgment orders of the United States District Court for the Western District of Washington that were entered on various dates, and are reprinted beginning at App. 46.

JURISDICTION

The Court of Appeals' decision was issued on October 9, 2009. Accordingly, this Court has jurisdiction of this matter under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case concerns the interpretation and application of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 401 *et seq.* (RHA). Relevant provisions of the RHA are reprinted beginning at App. 109.

INTRODUCTION

This petition presents issues of enormous importance regarding property ownership along the Nations' navigable waters that call for resolution by this Court. Petitioner Mary D. Sharp owns waterfront property within the Lummi Indian Reservation in Whatcom County, Washington. She and her husband (Homeowners)[1] own a home with a typical shore defense structure to protect against erosion, specifically a wooden bulkhead and riprap. The federal government joined with the Lummi Indian Nation to sue her for trespass because, even though the shore defense structure was originally erected on her own land, the beach between her structure and the tideland boundary subsequently eroded away. Instead of intersecting the beach, that boundary, the mean high water line, now intermittently intersects a portion of her shore defense structure.

The Ninth Circuit Court of Appeals ruled against Homeowners on three issues affecting owners of properties adjoining navigable waters, all of which create significant uncertainties unless resolved by this Court.

First, the Ninth Circuit ruled as a matter of federal property law that the owner of tidelands underlying navigable waters has a vested right to the

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[1] To provide consistency with the Ninth Circuit's reference to "Homeowners" this petition will refer to Mrs. Sharp and her husband as "Homeowners," even though she is the sole owner.

erosion of abutting uplands as they would exist in their natural state, and that this vested right supercedes the upland owner's right to erect shore defense structures to protect against erosion. This ruling places every owner of our Nation's waterfront developments at risk of future disputes with the owner of the adjacent submerged lands.

Second, the Ninth Circuit rearranged the text of Section 10 of the RHA to create an equally disruptive regulatory rule – that owners of property abutting navigable waters can be liable for erecting a shore defense structure without a federal permit even though, **at the time of its construction**, the shore defense structure was erected entirely out of navigable waters, and therefore, did not require a federal permit. The Ninth and Third Circuits are divided on the question whether Section 10 of the RHA imposes strict liability in light of its potential criminal penalties. Given the far-reaching scope of the RHA, this Court should resolve these issues.

Similarly, the Ninth Circuit held that courts should not balance the equities in deciding whether an injunction should issue under the RHA. The injunction here compels Homeowners to perpetually remove any part of their shore defense structure that intersects the boundary of the navigable water. Although this Court announced a contrary rule regarding injunctions under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (CWA) in *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982), this Court has not addressed the issue in the context of the RHA. Given

the similarly vast reach of regulatory power under the RHA, this Court should resolve this issue.

In light of the historic and widespread occurrence of shore defense structures, increasing trends in the general prevalence of erosion, and the prospects of rising sea levels, the Court should resolve these specific questions affecting the respective rights and responsibilities of owners of property abutting navigable waters and regulation under the RHA.

The pervasive impact of the Ninth Circuit's decision has not gone unnoticed. *See* David M. Ivester, *The Boundary of Navigable Waters and the Tidelands May Extend Behind Lawfully Built Shore Defense Structures as if They Do Not Exist*, 19 CALIFORNIA LAND USE REPORTER 99 (2010). This petition respectfully requests the Court to resolve the questions presented so as to avoid the widespread consequences of the Ninth Circuit's opinion – uncertainty on issues as significant as property ownership and the regulatory mandates of the RHA. *Id.* at 103.

Finally, the Ninth Circuit ruled that a commonplace generic disclaimer in the Washington Enabling Act, Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676, that disclaims title to "all lands lying within [the state] owned or held by an Indian or Indian tribes" precluded the State of Washington from acquiring title to specific tidelands upon statehood. No court has ever so ruled. This issue presents a fundamental question regarding the respective powers of two branches of federal government and the presumed

right of a state to ownership of tidelands upon statehood.

STATEMENT OF THE CASE

A. Overview

This case arises from the existence of a "shore defense structure," which protects Homeowners' residence from erosion. Here, the term "shore defense structure" refers to a bulkhead and riprap (essentially, large boulders), although in other contexts, similar structures are often referred to as seawalls, revetments, dikes, levees or embankments, among others.

Homeowners' property borders the Strait of Georgia, connected to Puget Sound and the Pacific Ocean through the Strait of Juan de Fuca. The property lies in an area known as Sandy Point, located within the boundaries of the Lummi Indian Reservation in Whatcom County, Washington.

Mrs. Sharp purchased their Sandy Point home in 1980. In 1977, her predecessor in interest built a wooden retaining wall to level the building site and protect against erosion, that functions as a bulkhead. The wall is embedded into the ground to provide stability.

After a major storm in 1982, Homeowners added riprap, essentially boulders ranging from one to four feet in diameter, to the seaward side of the wooden

retaining wall. Riprap provides additional stability to the bulkhead and the jagged face of the riprap dissipates the force of waves during storm surges and reflects waves in an asymmetrical manner, thereby reducing the erosion of sand and gravel on the seaward side of the structure. In 1993, Homeowners added riprap on top of the existing riprap.

The bulkhead, riprap, and additions thereto were originally erected entirely on the uplands, that is, landward of where the Mean High Water (MHW) line intersects the beach. The line where the elevation of MHW intersects the land is the property boundary between upland and tidelands. App. 98-100. However, the beach that existed at the time of construction between Homeowners' structure and the MHW line has eroded to some extent. Now, the MHW elevation, at times, intersects the riprap instead of the beach.

It should be understood that the beach rises and falls on a seasonal and daily basis due to the tidal deposition of sand and gravel during the summer months and erosion of the same during the winter months. *See generally* App. 7, n.3. As a result, MHW intersects Homeowners' riprap during some periods and not during others.

The Lummi Indian Nation (Lummi Nation) claims beneficial ownership of the tidelands. It asserts that, if MHW intersects a shore defense structure, the property line permeates or projects through the structure instead of stopping at the seaward face of the structure. The federal government agrees, and

instituted this action against the Homeowners on behalf of the Lummi Nation.[2]

The federal government's complaint alleged trespass by Homeowners' "shore defense structure" on tidelands held in trust for the Lummi Nation. The complaint also alleged violations of the RHA and the CWA and sought injunctive relief. The Lummi subsequently intervened, alleging only claims for trespass.

Homeowners contend that they cannot be liable for trespass against the United States or the Lummi Nation because their shore defense structure was originally built on their own land. Specifically, Homeowners assert that they cannot be in violation of the RHA for failing to obtain a federal permit because, at the time of its original construction, the shore defense structure was erected entirely out of navigable waters of the United States, thereby obviating the need for a federal permit. Finally, Homeowners contend they are not liable for trespass because, under the equal footing doctrine, the State of Washington is the owner of the tidelands.

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[2] Before filing suit, the U.S. Attorney contacted seven sets of landowners about allegations of trespass on the Lummi Nation's tidelands. The suit was brought against the owners of six properties – the one which was not sued was then acting as the CEO of the Lummi Nation.

B. Facts Regarding Tideland Ownership

In 1855, the Government executed the Treaty of Point Elliott[3] (Treaty) with several Western Washington tribes, including the Lummi. The Treaty expressly relinquished all aboriginal title to land. The Treaty also established special reservations for the tribes, and provided for the possibility of relocating all tribes to a general reservation.

The reservation at which the Lummi were located comprised only of the "island of Chah-choo-sen" in the Lummi River, which does not include Sandy Point. In 1873, President Grant, by Executive Order, expanded the reservation to include Sandy Point and extended all reservation boundaries to "low water." "Low water" has been interpreted to include tidelands. At issue in this case is whether the President was authorized to, and intended to, permanently reserve Sandy Point tidelands, thereby defeating the presumptive transfer of tidelands to Washington upon statehood.

The only action of Congress referenced by the Ninth Circuit is the Washington Enabling Act, 25 Stat. at 677, which required the new State of Washington to disclaim title to all "lands lying within [the state] owned or held by any Indian or Indian tribes." *Id.* Homeowners contend that this is

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[3] Treaty Between the United States and the Duwámish, Suquámish, and Other Allied and Subordinate Tribes of Indians in Washington Territory, Jan. 22, 1855, 12 Stat. 927 (1859).

insufficient to constitute the requisite Congressional intent to defeat presumptive state title to tidelands upon statehood.

C. The District Court Decisions

District Court Judge Barbara Rothstein resolved all of the issues in a series of summary judgment motions. The Court rejected Homeowners' argument that the tidelands were owned by the State of Washington and not the federal Government. App. 78-79. Similarly, the Court rejected Homeowners' position that they could construct shore defense structures on their own uplands to prevent erosion and thereby keep the MHW line from moving landward. App. 64, *et seq.*

The Court also ruled on partial summary judgment that Homeowners' shore defense structure trespassed, App. 52-56, and violated the RHA's permitting requirements, even though it is undisputed that no permit was required at the time the structure was originally built or enlarged. App. 56-58.

Judge Rothstein ordered Homeowners to remove the portion of their structure that subsequently intersected MHW, as it would have existed in its natural state but for the shore defense structure and to perpetually move such structures if MHW continues to shift further landward. App. 62-63. The CWA claim was voluntarily dismissed by the federal Government.

D. The Ninth Circuit Decision

Homeowners' appeal to the Ninth Circuit provided no relief. The Court concluded that the State of Washington did not obtain the tidelands upon statehood, App. 18, that the Homeowners' shore defense structure constituted a trespass because the Lummi Nation had a vested right to the erosion of Homeowners' property, App. 22, and that Homeowners violated the RHA because their shore defense structure currently existed in navigable waters without a federal permit, even though the structure was originally constructed entirely out of navigable waters, thereby obviating the need for a federal permit. App. 36.

In several places of its opinion, the Ninth Circuit criticizes the Homeowners for failing to reach a settlement with the Lummi Nation, a criticism that should have no bearing on judicial resolution of any dispute.[4] App. 44; *see also* App. 28.

This outrageous criticism of Homeowners is based on an inaccurate assumption of an unwillingness to settle. Homeowners have always been willing

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[4] The Ninth Circuit also noted that an organization of homeowners agreed to lease the tidelands pursuant to a 25-year lease that ended in 1988. App. 6, 15. Although the Ninth Circuit's opinion might lead one to conclude otherwise, this association did not include Homeowners in this case. Rather, its members owned properties located elsewhere at Sandy Point, but not bordering the tidelands adjoining Homeowners' properties.

to settle, just not on the unreasonable terms demanded by the Lummi Nation, which uses the full litigation and regulatory power of the federal government and the potential destruction of Homeowners' residence as leverage.[5]

Finally, the Ninth Circuit recognized that the Government's RHA claim was not really based on the purposes of the RHA in protecting navigation in the Nation's waters.

> [T]he United States indicated that its concerns would be satisfied if the Homeowners entered into agreements with the Lummi.

App. 44. In essence, the federal government's RHA claim is simply to pressure the Homeowners to succumb to the demands of the Lummi Nation.

Homeowners find themselves in the most unenviable position – defending themselves against the federal government which has joined with a separate entity claiming sovereign nation status, defending on issues pertaining to state and national sovereignty, the nation's waters, and the regulatory power of the

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[5] If there is a trespass, Homeowners have always been willing to pay the tideland owner for the fair market rental value of any land upon which they might be trespassing. Potential settlement with the Lummi Nation, however, is necessarily limited by its demands. Homeowners' willingness to pay the tideland owners the fair market rental value underlies their argument that the State is the owner of the tidelands. Washington State has a well-established system for leasing tidelands based on fair market value. *See* Wash. Rev. Code § 79.125.400.

federal government. Homeowners urge the Court to grant the petition in this case for the reasons addressed below.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit has decided an important question of federal property law which has not been, but should be, settled by this Court regarding property ownership with waterfront boundaries.

The Ninth Circuit decided that the Homeowners are trespassing because a portion of their shore defense structure is located in an area where the tideland boundary intersects the structure.[6] Rather than accepting the Homeowners' argument that the boundary between uplands and tidelands is where the elevation of MHW intersects the beach or any

[6] The Ninth Circuit decided these were matters of federal law because this was an action for trespass on lands owned by Indians. App. 10. Because one of the questions in this case is whether the tidelands are in fact owned for the Lummi Nation, a more accurate conclusion is that federal law applies because federal law is the proper choice when ruling upon competing rights between the United States and others on navigable waters. *See California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 280, 283 (1982).

Federal law is also the applicable law when dealing with the competing rights of a citizen and his own state on land bordered by navigable waters. *See Hughes v. State of Washington*, 389 U.S. 290 (1967).

lawfully placed structure, the Ninth Circuit ruled that structures designed to prevent erosion cannot stop the property line from moving.

This is a remarkable ruling that will have dramatic impacts along the coastline. Under the Ninth Circuit's new rule that tideland owners have a right to future erosion (App. 26-27), waterfront property boundaries must be where MHW would otherwise intersect the ground if the ground or beach were left in its natural state. Lawfully built structures on one's own land, essentially fixtures to the land itself,[7] must be ignored and the boundary line will be relocated to wherever the MHW elevation would have intersected the shore if legal, shore defense structures had never been built, but the shore had been left in its natural state. This ruling alters waterfront ownerships for innumerable individual property owners, cities, ports and businesses – virtually any waterfront owner who has erected a bulkhead or other structure to prevent erosion.

As noted by an *amicus curiae* before the Ninth Circuit, 930 miles of the 1100 miles of coastline in California alone is actively eroding. B. Benumof, G. Griggs & L. Moore, *Coastal Erosion: The State of the Problem and the Problem of the State*, *in* 1 CALIFORNIA

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[7] Structures which are permanently attached to land are considered part of the land itself. *See* 8 RICHARD R. POWELL, POWELL ON REAL PROPERTY, ¶¶ 57.02, 57.05 (M.A. Wolf ed., 2000); 5 AMERICAN LAW OF PROPERTY, § 19.1-19.4.

AND THE WORLD OCEAN '97 505 (O. Magoon, *et al.* eds., 1998). *See also* G.B. Griggs, *The Armoring of California's Coast*, *in* 1 CALIFORNIA AND THE WORLD OCEAN '97 518, 521 (Magoon, *et al.*) (describing investments in protecting California beach properties after El Niño years and noting that 12% of California's entire coastline has been protected with structures). Nevertheless, beach erosion is not only a Pacific Coast phenomenon. The Federal Emergency Management Agency in 2000 estimates 25 percent of homes within 500 feet of the Nation's coastline and shores of the Great Lakes will fall victim to erosion. FEMA, *Significant Losses From Coastal Erosion Anticipated Along U.S. Coastlines*, Release No. HQ-00-095 (June 27, 2000).[8]

Not only are bulkheads or seawalls along the coastline at risk of being claimed by the tideland owner, large areas of reclaimed land are also at risk, such as the entire City of New Orleans, Boston's Back Bay, major portions of San Francisco, San Jose, and Seattle, to name a few. They are at risk simply because a variety of embankments have stopped the flow of water and prevented, as they were intended, the erosion of the land.

If this decision is allowed to stand, one can expect a flurry of litigation on the location of the boundary line if it must be based on where the MHW line would

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[8] *Available at* http://www.fema.gov/news/newsrelease.fema?id=7708 (retrieved Jan. 5, 2009).

be if left in its natural state. For a multitude of areas where the coastline has not been in its natural state for decades, if not more than a century, there will be battles of experts opining on where the beach would be based on the hypothetical, "what if nothing were built."

In affirming that the Homeowners are trespassing by the presence of shore defense structures on the tidelands, the Ninth Circuit has announced a startling change in the common law that wreaks havoc on the Pacific Coast. **With one hand** it affirms that "the common law also supports the owner's right to build structures upon the land to protect against erosion." App. 19 (citing *Cass v. Dicks*, 44 P. 113, 114 (Wash. 1896)). "The Homeowners rightly note that the common law permits them to erect shore defense structures on their property to prevent erosion." App. 24. **With the other hand**, it undermines this right by dictating that the tideland owner is actually the owner of the very land sought to be protected from the ravages of the sea.

Support for the common law right to protect uplands from the sea lies in the common enemy doctrine. The Court in *Revell v. People*, 52 N.E. 1052 (Ill. 1898) gathered and quoted several authorities relative to the common enemy doctrine and the right to protect one's property from the sea, including WOOD ON NUISANCES § 494 (2d ed., 1883) and GOULD ON WATERS § 160 (2d ed., 1891).

The Ninth Circuit flatly rejects the common enemy doctrine as a rationale for the Homeowners' position that they are not trespassing, App. 26,[9] although it still recognizes the common law right to protect property from erosion generally.

Regardless of the origin of the right to protect property from erosion, the Ninth Circuit's decision has simply eviscerated that right. Additionally, its decision ignores that the placement of a structure on one's own land becomes part of the land and the MHW line stops at the face of that structure. Instead, it assumes that the property line ignores the existing structure and, instead, permeates it and places the boundary as if the structure never existed.[10]

The essence of the Ninth Circuit's decision is this:

> Given that the Lummi have a vested right to the ambulatory boundary and to the tidelands they would gain if the boundary were allowed to ambulate, the Homeowners do

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[9] Washington has rejected the common enemy doctrine as an absolute defense to injuries sustained as a result of works to prevent the flooding of sea water. *See Grundy v. Thurston County*, 117 P.3d 1089 (Wash.2005).

[10] Although neither the Homeowners, nor their predecessors filled submerged tidelands, the common law recognizes that if one lawfully fills submerged land, the filled lands belong to the upland owner. *Rights to Land Created at Water's Edge by Filling or Dredging*, Annot., 91 A.L.R.2d 857 (1963).

Here, the Homeowners have not even filled submerged land, but merely fortified uplands so that they do not become submerged.

> not have the right to permanently fix the property boundary absent consent from the United States or the Lummi Nation.

App. 26-27.

Ultimately, the Ninth Circuit rules that the right to protect one's own property is subordinate to a heretofore unrecognized right in the tideland owner to perpetual erosion, a right that cannot be hindered by any lawful structure placed by the upland owner. App. 26-27.

> [W]e conclude that because both the upland and tideland owners have a vested right to gains from the ambulation of the boundary, the Homeowners cannot permanently fix the property boundary, thereby depriving the Lummi of tidelands that they would otherwise gain.

App. 20.[11]

The Ninth Circuit cites numerous authorities for the proposition that the right to accreted land is a natural and vested right associated by the ownership of property bounded by a water body. App. 22-23.

Of course, when an upland owner's property increases through the deposit of alluvion (or reliction),

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[11] *Cf. Save Oregon's Cape Kiwanda Organization v. Tillamook County*, 177 34 P.3d 745, 751 (Or.Ct.App. 2001) (affirmed findings that riprap along the shore would as a practical matter "effectively fix the position of the shoreline").

it is not at the expense of the tideland owner. The tidelands simply move (in this case, to the west) from their former location where they bordered the upland in its former state.

On the other hand, when upland is subject to erosion, the upland owner clearly loses property and, in this case, subjects the home on the property to a complete loss if the erosion is not abated.

The Ninth Circuit twists these well-established principles to create a new doctrine, not supported in law or history, that a property owner cannot as a matter of property law make otherwise lawful efforts on their own property that might minimize the risk of erosion solely because minimizing erosion would infringe on the tideland owners' supposedly vested right to future erosion.

While the Ninth Circuit correctly observes that water boundaries often are regarded to be ambulatory, it incorrectly supposes that property owners therefore have no right to pause or reduce ambulation of the boundary. For the Ninth Circuit's ruling to remain, the result is that every lawfully allowed structure that prevents erosion is trespassing against whomever owns the submerged lands adjacent to the dike, seawall, embankment or bulkhead. Furthermore, the property owners on both sides of the line are in the impossible position having to divine where the line would be if the structure were never built. The serious consequences for areas such as Seattle, Portland, San Francisco, and Los Angeles are obvious. If

this is the federal rule of property, numerous developed areas are also at risk of having the titles uncertain, such as the entire City of New Orleans, Boston's Back Bay, or any reclaimed land. This Court should grant the writ Homeowners seek.

II. The Ninth Circuit's decision conflicts with decisions of this Court and other courts of appeals regarding the scope and requirements of the Rivers and Harbors Act.

In addition to finding the Homeowners liable for trespass, the Ninth Circuit held that Homeowners' shore defense structure violated the Rivers and Harbors Act, even though the structure did not require a permit when built. Indeed, the Ninth Circuit expressly recognized:

> The Homeowners' structures may have been legal as initially built, but because of the movement of the tidal boundary they now sit in navigable waters and are obstructions.

App. 32 (footnote omitted).

The Ninth Circuit's holding on the RHA constitutes a rearranging of the statute's text, blending distinct provisions to create a completely new violation – one where activity that required no permit and creates no obstruction to navigation nonetheless can be held to violate the RHA. Such a wide, sweeping alteration of the RHA's provisions affects every property owner bordering a navigable water of the United

States and places in legal jeopardy every bulkhead, dike, or seawall originally erected out of Corps jurisdiction.

A. The RHA's prohibitions.

Section 10 of the RHA, 33 U.S.C. § 403, contains three clauses, creating three different types of violations:

> [1] The **creation** of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and
>
> [2] it shall not be lawful **to build** or **commence the building** of any . . . bulkhead, jetty, or other structures in any . . . water of the United States, . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and
>
> [3] it shall not be lawful **to excavate or fill**, or in any manner **to alter or modify** the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army **prior to beginning the same**.

33 U.S.C. § 403 (line breaks, numbering and emphasis added), reproduced at App. 109.

The first clause prohibits the "creation of any obstruction" to the "navigable capacity . . . of the waters of the United States." The creation of such an obstruction cannot be approved by the Corps – it can only be approved by Congress. The second clause prohibits building or commencing the building of a structure in waters of the United States without a permit from the Corps of Engineers. The third clause prohibits filling, excavating, modifying or altering navigable waters without a permit from the Corps of Engineers.

The Ninth Circuit's decision goes beyond these prohibitions, claiming that the RHA makes unlawful the mere existence and maintenance of structures in navigable waters – even if originally built entirely outside of navigable waters. This claim is troubling. First, the statute does not include the word "maintain" in the list of prohibited activities. *See* 33 U.S.C. § 403. By its plain terms, the statute is limited to activities, *i.e.*, creating, building, filling and excavating in navigable waters. Courts may not add words to the statute (especially one for which criminal penalties apply), which Congress chose not to include. Rather, this Court has consistently recognized that courts have a "duty to refrain from reading a phrase into the statute when Congress has left it out." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

Moreover, it is notable that the Government did not seek to enforce Section 13 of the RHA, 33 U.S.C. § 407, commonly referred to as the Refuse Act.

As explained by this Court in *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973), this statute contains "two separate offenses", namely the discharge or deposit of refuse into navigable waters and the **deposit of material on the bank** of a navigable waterway that impedes or obstructs navigation. *Id.* at 662. This Court concluded that the first Section 13 offense did not require any effect on navigation – in part because the reference to navigation in the statute was tied to the placement of material on the banks, an element of the second offence. *Id.* at 672 n.23.

In affirming a violation of Section 10 of the RHA here, the Ninth Circuit plainly circumvents the choice by Congress that the placement of material on banks would be governed by Section 13 – which limits liability to deposits that affect navigation.[12]

Not only does the Ninth Circuit's decision have far reaching implications for the owners of waterfront property, but as addressed below, it conflicts in several respects with decisions of other courts.

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[12] Additionally, violations of Section 13 of the RHA (33 U.S.C. § 407) are enforced through 33 U.S.C. § 411, and not through 33 U.S.C. § 406, the statute relied upon by the Government in this case.

B. The Ninth Circuit's decision conflicts with the decisions of this and other courts regarding the first clause of Section 10 of the RHA.

To find liability under the first clause of 33 U.S.C. § 403, the Government must show that the obstruction is not merely **in** navigable waters, but rather **is an obstruction to** the **navigable capacity** of the waterway. Such an obstruction cannot be authorized by the Corps, but only by Congress. More importantly, this Court has held that it is "a **question of fact** whether the act sought to be enjoined is one which fairly and directly tends to obstruct (that is, interfere with or diminish) the navigable capacity." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 729 (1899) (emphasis added).[13] Here, the Government contended that it need not show that Homeowners' structures actually impacted navigation.

In reaching this conclusion, the Ninth Circuit relied on its earlier decision in *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161 (9th Cir. 2000), a case involving the first clause of Section 10. *Id.* at 1165. The *Alameda Gateway* decision demonstrates the necessity of interfering with navigation to find a violation. The focus of the court in that case was the interference the pier at issue posed to the navigable

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[13] This case describes the RHA prior to the 1899 amendment. However, the point of law for which it is cited remains valid (*i.e.*, the determination of whether something constituted an obstruction is a question of fact).

capacity of the harbor. *Id.* ("Gateway's piers prevented the creation of a turning basin that could safely accommodate larger vessels entering the Harbor.").

Here, however, the Ninth Circuit concluded that the "structure" at issue was an "obstruction" for two reasons. First, the Ninth Circuit reasoned that the structure is the result of activities that require a permit under the second clause, **if they were conducted in navigable waters**. But this reasoning is circular in that the Homeowners' activities did not require a permit under the second clause precisely because they were not conducted in navigable waters.

The other reason offered by the Ninth Circuit is that, under its own precedent in *Alameda Gateway,* lawfully built obstructions can still be subject to removal. App. 31 (citing *Alameda Gateway* and *United States v. New York Central R.R.*, 252 F. Supp. 508, 511 (D.Mass. 1965) (finding landward remnants of a previously legal bridge an obstruction), *aff'd per curiam*, 358 F.2d 747 (1st Cir. 1966)). The problem with the Ninth Circuit's reliance on *Alameda Gateway* and *New York Central* is that in both cases there were actual obstructions to navigation present. In *New York Central*, it was a collapsed bridge that "caused additional danger of injury to tankers." 252 F.Supp. at 510. There is no authority for the proposition that structures that do not actually obstruct the navigable capacity of the water – like Homeowners' shore defense structure – can constitute violations of the first clause.

Beyond this, the Ninth Circuit asserted that structures that violate the second or third clauses are "presumed to be obstructions under the first clause," App. 32, relying on its decisions in *Alameda Gateway*, 213 F.3d at 1165, and *Sierra Club v. Andrus*, 610 F.2d 581, 596 (9th Cir. 1979). However, this Court reversed the Ninth Circuit's decision in *Andrus* on other grounds. *California v. Sierra Club*, 451 U.S. 287 (1981). Nevertheless, the Ninth Circuit's ruling that structures that violate the second or third clauses also violate the first clause is preposterous given that it necessarily places all actions in navigable waters within the scope of the first clause, and thus within Congress' exclusive permitting authority – thereby rendering the Corps' permitting powers under the second and third clauses superfluous.

Finally, given the circumstances in this case, finding Homeowners liable under the first clause of the RHA is nonsensical. The Court's decision flies in the face of the undisputed fact that Homeowners did not place anything in RHA jurisdiction – that is, seaward of MHW – at the time it was placed. The law is clear that an obstruction within the meaning of the first clause requires Congressional approval. Thus, even though no permit was needed for the original construction of Homeowners' shore defense structures, under the Ninth Circuit's reasoning they can be liable based on changes to the shoreline caused by others – and their only protection from liability is an "after the fact" permit **from Congress**. The Ninth

Circuit's interpretation of the first clause of Section 10 of the RHA should be reviewed by this Court to eliminate such a burdensome, unintended result.

C. The Ninth Circuit's decision regarding the second clause of Section 10 of the RHA raises important questions of federal law that have not been, but should be, answered by this Court.

After declaring that all second and third clause violations result in a violation of the first clause, the Ninth Circuit ruled that there is no need for an actual obstruction of navigable capacity of the water body, "since the structures obviously qualify as a 'breakwater, bulkhead, . . . or other structure' under clause two." App. 33.

This superficial analysis again ignores the statutory language. To find a violation under the second clause, the Homeowners must have "buil[t]" the structure "in" waters of the United States. As the Ninth Circuit expressly acknowledges, this structure was built above the MHW line and, therefore, out of navigable waters. App. 32.

Here, Homeowners have not **built** a structure **in** navigable waters. They built out of navigable waters, above MHW at the time of construction. Subsequent changes to the beach have caused MHW to reach their riprap. The Court's decision to impose liability under Section 10 of the RHA assumes the verbs in the statute, "to build" or "commence the building of,"

mean nothing. To overlook the operative words of the statute means liability can attach under the RHA even where no permit was needed at the time the work was done. The Court should settle this important issue affecting practically all waterfront property in the Nation.[14]

D. The Ninth Circuit's decision regarding the third clause of Section 10 of the RHA raises important questions of federal law that have not been, but should be, answered by this Court.

The Ninth Circuit held that one can violate the second or third clause "even if the structure or activity is not located in navigable waters." App. 35 (citing *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1298 (5th Cir. 1976)). *Sexton Cove*, however, involved excavating the shore to create canals and alter the water body by expanding it. The activity directly and significantly altered the shape and size of the water body. Hence, *Sexton Cove* does not support the Ninth Circuit's conclusion.

Moreover, as with the second clause, the Ninth Circuit's decision ignores the unmistakable operative language in the third clause that one must fill,

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[14] The Ninth Circuit's decision also directly conflicts with the New York court in *People v. Amerada Hess Corp.*, 84 Misc.2d 1036 (1975) in interpreting analogous rules in a case where material was placed on the banks, rather than in the water.

excavate, alter or modify the water body without first having obtained a permit from the Corps. 33 U.S.C. § 403 (App. 109). Homeowners took no actions to alter or modify the water body; rather, they and their predecessors took actions to prevent the water body from destroying their property by building a shore defense structure outside of the water body, above MHW.

As with its ruling on the other clauses of Section 10 of the RHA, the Ninth Circuit's ruling potentially subjects anyone to liability under the RHA who built or owns a shore defense structure above MHW on any navigable waterway in the country. It does so by ignoring the language chosen by Congress to describe violations. This Court should review the Ninth Circuit's decision.

E. The Ninth Circuit's elimination of an intent requirement for a RHA violation conflicts with the decisions of other courts of appeals.

The Ninth Circuit clearly repudiated the need for intent to find a RHA violation, other than the mere intent to do nothing in regard to preexisting bulkheads or riprap. App. 36 (affirming App. 57 n.7). This holding conflicts with decisions from the Court of Appeals for the Third Circuit.

The Court in *United States v. Ohio Barge Lines, Inc.*, 607 F.2d 624 (3d Cir. 1979) made clear that there is no strict liability under 33 U.S.C. § 403 because it exposes one to criminal sanctions, including

imprisonment. *Id.* at 628. Such statutes are to be construed strictly. *Id.* (citing *United States v. Bigan*, 170 F.Supp. 219, 223 (W.D.Pa. 1959), *aff'd*, 274 F.2d 729 (3d Cir. 1960)).

The Ninth Circuit treats Section 10 of the RHA as imposing strict liability, as does the Eleventh Circuit. *See United States v. Baycon Industries, Inc.*, 744 F.2d 1505, 1507 n.6 (11th Cir. 1984). The Third Circuit does not. *Bigan*, 274 F.2d 729; *United States v. West Indies Transp., Inc.*, 127 F.3d 299, 310 (3d Cir. 1997). The Fifth Circuit recognized the split, but declined to decide on which side of the split it would land. *United States v. Nassau Marine Corp.*, 778 F.2d 1111, 1113-14 (5th Cir. 1985).

This Court should settle this important issue and decide whether Homeowners can be liable for the placement of riprap outside of the jurisdictional boundary of the RHA simply because the boundary moved toward their riprap through no fault of their own.

F. The Ninth Circuit's decision on the availability of and conditions applicable to injunctive relief under the RHA should be reviewed by this Court.

1. The Ninth Circuit's decision that the enforcement provisions in Section 12 of the RHA apply is an important issue which should be settled by this Court.

If Homeowners are required to get a RHA permit even though they constructed outside of navigable waters, the enforcement provision of the RHA (Section 12) does not allow for an injunction in these circumstances. It provides that "removal of any structures or parts of structures **erected in** violation of the provisions of [the RHA or its implementing regulations] **may** be enforced by the injunction of any district court." 33 U.S.C. § 406 (App. 109) (emphasis added). Thus, by the statute's plain terms, the enforcement power extends only to structures "**erected** in violation" of the RHA. *Id.* (emphasis added). The Homeowners did not erect anything in violation of the RHA. They are accordingly not within the scope of 33 U.S.C. § 406.

This distinction between Sections 10 and 12 was explained by the Third Circuit in *Bigan*, 274 F.2d 729. In *Bigan*, the property owner had engaged in strip mining on uplands, but earth which had been removed during mining and negligently piled near a navigable river washed into the river during a torrential rain. *Id.* at 730.

The Third Circuit found that an injunction was inappropriate because of the limited scope of Section 12. *Id.* at 732. In the same vein, while Homeowners or their predecessor built a shore defense structure, they did not "erect it" in violation of the RHA.

The Ninth Circuit's affirmation of the injunction under the RHA does violence to Congressional choice of words in the statute and perpetuates a conflict among the Circuits which should be settled by this Court.

2. The Ninth Circuit's ruling that an injunction is automatic conflicts with decisions from this and other courts.

In affirming the issuance of the district court's injunction, the Ninth Circuit held that there is no need to balance competing interests. App. 36 (citing *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974)). This decision conflicts with decisions from this and other courts.

In *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982), this Court made clear that the issuance of an injunction is an extraordinary remedy that involves the balancing of competing interests. In *Weinberger*, an injunction was denied despite discharges of pollutants in violation of the CWA. Although *Weinberger* was specifically briefed by the Homeowners, the Ninth Circuit simply ignored it and instead relied on *Stoeco*, a Third Circuit decision

that pre-dates *Weinberger*, for the proposition that equitable considerations should not be considered in determining whether Homeowners should be enjoined in the circumstances of this case.

Several other courts have explained that injunctions under the RHA are subject to equitable considerations because of the "may" language in the statute. *See South Carolina ex rel. Maybank v. South Carolina Elec. & Gas. Co.*, 41 F.Supp. 111, 119 (E.D.S.C. 1941); *United States v. Bailey*, 467 F.Supp. 925 (E.D.Ark. 1979).

Equitable considerations are especially critical in the present case. The district court's order to remove the riprap is impractical because the Homeowners must keep moving riprap based on constantly changing beach conditions. Courts have properly recognized that a moving tidal boundary line caused by winter/summer fluctuations is a factor that weighs against injunctive relief because of uncertainty and constant movement. *People v. William Kent Estate Co.*, 51 Cal.Rptr. 215, 219 (Cal.Dist.Ct.App. 1966).

The Court should issue the writ to resolve whether injunctive relief under Section 12 of the RHA is subject to the normal equitable balancing of interests indicated by this Court in *Weinberger*.

III. The Ninth Circuit's opinion has decided an important question of federal law in a way that conflicts with relevant decisions of this Court regarding the reservation of submerged lands from future states.

Whether the Homeowners are trespassing against the United States and Lummi Nation rests upon the assumption that the Government owns the tidelands. Federal ownership of the tidelands, in turn, hinges on whether the Government retained title to the tidelands upon Washington's admission to the Union in 1889. The answer to this depends upon the "equal footing doctrine," which presumes that new states enter the Union on the same footing as the original thirteen in regard to state ownership of submerged lands. *See Utah Division of State Lands v. United States*, 482 U.S. 193, 195-198 (1987).

This Court has reiterated this doctrine by stating that the courts must "begin with a **strong presumption against**" any action that would defeat a future state's title. *Montana v. United States*, 450 U.S. 544, 552 (1981) (emphasis added). In *Utah Division*, this Court clarified its earlier *Montana* decision by stating that Congress defeats the strong presumption of state title "only in the most unusual circumstances." *Id.* at 197. The Ninth Circuit's decision on ownership of the tidelands contradicts this Court's emphatic language that submerged lands are presumed to have been transferred to a new state.

The Ninth Circuit's rationale for its decision on this issue can be distilled to the following bases:

- First, *stare decisis* dictated the result absent a contrary decision from this Court, insofar as prior decisions had ruled that the Lummi Nation owns some tidelands at Sandy Point. *See United States v. Romaine*, 255 F. 253 (9th Cir. 1919); *United States v. Stotts*, 49 F.2d 619 (W.D.Wash. 1930); *United States v. Washington*, 969 F.2d 752 (9th Cir. 1992).
- Second, the absence of the State of Washington as a party to this case counseled against a conclusion that title resided in the state.
- Third, the tidelands were withheld from the state under this Court's Equal Footing Doctrine jurisprudence.

As to the first basis, "the doctrine of stare decisis does not apply with full force prior to decision in the court of last resort." *Posados v. Warner, Barnes & Co.*, 279 U.S. 340, 345 (1929). Moreover, the cases relied upon do not control the questions presented here.[15]

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[15] *Romaine* involved tidelands in the river delta reserved specifically by the Treaty, which was explicitly approved by Congress, rather than the Sandy Point tidelands which are included only by the Executive Order.

United States v. Washington is even more attenuated because the issue was whether the reservation boundary followed a straight line at one point or followed the shore, not on Sandy

(Continued on following page)

Nor do these cases create a rule of property that cannot be revisited.[16]

In regard to the second basis for the Court's decision, the Ninth Circuit indicated that absence of the State of Washington in this litigation supports its conclusion that the tidelands are not owned by the state. App. 14. This directly conflicts with this Court's seminal decision in *Pollard v. Hagan*, 44 U.S. 212 (1845), involving an ejectment action (similar to

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Point. That the Treaty and the Executive Order were consistent on this issue, 969 F.2d at 755-56, provides no resolution of whether the Executive Order alone was sufficient to prevent tidelands from transferring to the State of Washington.

Similarly, the district court decision in *Stotts* is not controlling because it is not clear where the tidelands in that case were located or whether they were reserved by the Executive Order alone. *Stotts* did not answer the questions raised here.

[16] *Compare Moore v. United States*, 157 F.2d 760, 764 (9th Cir. 1946) (revisiting issue of tribal ownership of tidal waters) *with Taylor v. United States*, 44 F.2d 531 (9th Cir. 1930).

Moreover, the Ninth Circuit assumes that the Lummi Nation and homeowners have "long relied on the fact that the Lummi own the tidelands," pointing to an old lease of tidelands at Sandy Point. App. 15. However, the Sharps never had a lease with the Lummi Nation. That a homeowners association representing people from other parts of Sandy Point at one time leased the tidelands is not the kind of long term reliance or burden on existing expectations that creates a rule of property. *See Montana v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 665 F.2d 951 (9th Cir. 1982) (referring to substantial sums flowing to the tribe from leases from a hydroelectric facility). Indeed, instead of longstanding expectations that the federal government owns these tidelands, there has been a longstanding uncertainty over that question.

trespass) where the defendant argued successfully that the plaintiff did not own the property at issue because it consisted of the bed of navigable waters given to the State of Alabama – despite the facts that the state was not a party and the claim of ownership did not derive from the state.[17]

With regard to the third basis, the Ninth Circuit held that even when the Executive Order is viewed in light of this Court's recent equal footing jurisprudence, President Grant's order extending the reservation to include tidelands was sufficient to withhold these tidelands from the state. App. 15. Specifically, the Ninth Circuit claimed the two part test from *Idaho v. United States*, 533 U.S. 262, 273 (2001), was satisfied in this case. App. 15. This test asks "whether Congress intended to include land under navigable waters within the federal reservation and, if so, whether Congress intended to defeat the future State's title to the submerged lands." *Idaho*, 533 U.S. at 273.

The second part of the test is at issue here. The Ninth Circuit's application of the second part of the test is a radical departure from this Court's jurisprudence. The Ninth Circuit concluded that Congress "recognized the validity of the executive order

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[17] It is also contrary to the Ninth Circuit's prior precedent that a party accused of trespass may argue that a non-party State actually owns the property. *See Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1255-56 (9th Cir. 1983).

reservation by requiring Washington state to 'forever disclaim all right and title . . . to all lands . . . owned or held by any Indian or Indian tribes.'" 25 Stat. at 677, *quoted at* App. 17. Under the precedent set by the Ninth Circuit in this case, this general, boilerplate disclaimer language, common among states admitted in the west, is sufficient to overcome the strong presumption against withholding title to the beds of navigable waters – despite the lack of any specific recognition of what was reserved.[18]

Although the Ninth Circuit purports to rely upon this Court's decision in *United States v. Alaska (Arctic Coast)*, 521 U.S. 1 (1997), its decision is directly contrary to this Court's ruling in that case. In *Arctic Coast,* this Court emphasized that Congress has never given the President authority to defeat state title to land under navigable waters by a general statute. 521 U.S. at 44. Rather, this Court has always viewed the equal footing doctrine to require that the land being withheld from the new state be identified with particularity.

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[18] In *Idaho*, after noting that the disclaimer provision in the Idaho Statehood Act was a boilerplate formulation used with every State admitted between the years 1889 and 1912, including Washington, the four dissenting Justices noted:

> This disclaimer, in any event, simply begs the question whether submerged lands were in fact "owned or held" by the Coeur d'Alene Tribe upon Idaho's admission.

533 U.S. at 285 n.2 (Rehnquist, C.J., dissenting).

The *Arctic Coast* case involved two federal reservations prior to Alaska statehood, one of which was identified **by name**, *id.* at 41-42, and the other was specifically withheld from Alaska. *Id.* at 56-57 (certain statutorily described wildlife refuges transferred to Alaska while retaining federal ownership of all other submerged lands "withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife").

Similarly, in *Alaska v. United States (Glacier Bay)*, 545 U.S. 75 (2005), this Court held that Congress specifically withheld the Glacier Bay National Monument in the Alaska Statehood Act. In both *Arctic Coast* and *Glacier Bay*, this Court required an act of Congress expressly confirming the prior executive order reservations. The boilerplate disclaimer in the Washington Statehood Act is nothing like the specific Congressional references to the tracts at issue in the *Alaska* cases.

The conflict with this Court's analysis in *Idaho v. United States*, 533 U.S. 262, is even more pronounced. There, this Court went to great lengths to address exactly what Congress did in regard to the Coeur d'Alene Indian Tribe.

While the Court referenced the disclaimer in the Idaho Statehood Act, wherein the new state of Idaho disclaimed ownership of lands held by Indians, 533 U.S. at 270, the Court's decision rests upon other, specific indicia of Congressional intent to withhold the submerged lands at issue. For example, the Court

noted that both houses of Congress had approved the treaty with the Coeur d'Alene that included the lake in the reservation prior to Idaho's statehood, though it had not been finalized by the time Idaho became a state. The Court noted there was no "hint in the evidence that delay in final passage of the ratifying Act was meant to pull a fast one by allowing the reservation's submerged lands to pass to Idaho." *Id.* at 278.

Second, this Court also noted that Congress had extensive involvement with the Coeur d'Alene Tribe. The Ninth Circuit's decision ignores the significance of this point. There is no evidence of Congressional involvement with the Lummi Nation that is remotely similar to that deemed essential in *Idaho*.

The Ninth Circuit's decision in this case directly conflicts with all these authorities confirming that the inclusion of tidelands in a reservation by order of the executive – as opposed to a treaty or statute which specifically references the reserved area – is insufficient to prevent title to the tidelands from passing to a state upon statehood under the equal footing doctrine. If the mere existence of an executive order were sufficient to defeat the strong presumption against withholding submerged lands from future states, this Court's analyses in *Idaho, Arctic Coast* and *Glacier Bay* have been utterly superfluous.

At bottom, this Court should review the Ninth Circuit's re-interpretation of this Court's equal footing precedents that find the requirement of "extraordinary circumstances" met by a very ordinary boilerplate, generalized disclaimer.

CONCLUSION

The implications of the Ninth Circuit's trespass and RHA decisions for waterfront property owners cannot be overstated. The consequences of the Ninth Circuit's opinion will become only more pronounced as erosion increases or sea levels rise.

Additionally, the respective balance of authority between the executive, Congress and the rights of new states is significantly altered by the Ninth Circuit's resolution of the equal footing doctrine case. This Court is urged to grant the writ to resolve the issues raised herein.

DATED: January 7, 2010.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation,

Plaintiff-Appellee,

v.

KEITH E. MILNER,

Defendant,

and

BRENT C. NICHOLSON; MARY K. NICHOLSON,

Defendants-Appellants,

v.

LUMMI NATION,

Plaintiff-intervener-Appellee.

No. 05-35802

D.C. No. CV-01-00809-RBL

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation,

Plaintiff-Appellee,

v.

KEITH E. MILNER,

Defendant-Appellant,

SHIRLEY A. MILNER; MARY D. SHARP; IAN C. BENNETT; MARCIA A. BOYD,

Defendants-Appellants,

and

BRENT C. NICHOLSON; MARY K. NICHOLSON,

Defendants,

v.

LUMMI NATION,

Plaintiff-intervener.

No. 05-36126

D.C. No. CV-01-00809-RBL

OPINION

Appeal from the United States District Court for the Western District of Washington Ronald B. Leighton, District Judge, Presiding

Argued March 13, 2008
Submitted October 9, 2009
Seattle, Washington

Filed October 9, 2009

Before: Betty B. Fletcher, Richard A. Paez and Richard C. Tallman,* Circuit Judges.

Opinion by Judge B. Fletcher

COUNSEL

Richard M. Stephens, Groen Stephens & Klinge LLP, Bellevue, Washington, for the defendants-appellants.

Brian Kipnis, Office of the United States Attorney, Seattle, Washington, for the plaintiff-appellee.

Harry L. Johnsen, Raas, Johnsen & Stuen, P.S., Bellingham, Washington, for the plaintiff-intervenor-appellee.

Edgar B. Washburn, Morrison & Foerster LLP, San Francisco, California, for Amicus Building Industry Legal Defense Foundation.

John Briscoe, Briscoe Ivester & Bazel LLP, San Francisco, California, for Amicus Bay Planning Coalition.

OPINION

B. FLETCHER, Circuit Judge:

In this appeal we decide whether a group of waterfront homeowners are liable for common law

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* Judge Tallman was drawn to replace Judge William W. Schwarzer, Senior United States District Judge for the Northern District of California, and has read the briefs, reviewed the record, and listened to a recording of oral arguments.

trespass and violations of the Rivers and Harbors Appropriation Act of 1899 (RHA), 33 U.S.C. § 403, and the Clean Water Act (CWA), 33 U.S.C. § 1311, because the ambulatory tideland property boundary has come to intersect shore defense structures the homeowners have erected. In a series of summary judgment rulings and after a bench trial, the district court found against the homeowners and ordered them to remove violating structures and to pay a $1500 civil penalty. We affirm in part and reverse in part.

I.

In 1855, the United States executed the Treaty of Point Elliott with several Indian tribes, thereby acquiring a vast swath of what is now western Washington.[1] Treaty Between the United States and the Dwámish, Suquámish, and Other Allied and Subordinate Tribes of Indians in Washington Territory, Jan. 22, 1855, 12 Stat. 927 (1859) (the "Treaty of Point Elliott" or the "Treaty"). Under the terms of the Treaty, the tribes were relegated to certain reserved areas, including "the island called Chah-choo-sen," on which the Lummi Indian Reservation was created for

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[1] The Treaty of Point Elliott is one of a series of treaties negotiated by Territorial Governor Isaac Stevens with various Pacific Northwest Indian tribes in the mid-1800s. *See generally Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 661-62 (1979); *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791, 805-06 (D. Idaho 1994).

the plaintiff-intervenor, the Lummi Nation. *Id.* at 928. Although the Lummi initially occupied only the island, by an executive order, President Grant in 1873 expanded the reservation to encompass portions of the mainland, including Sandy Point, a sandy spit, all in what is now Whatcom County, Washington. Exec. Order (Nov. 22, 1873), *reprinted in* 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 917 (1904), *available at* http://digital.library.okstate.edu/kappler/Vol1/Images/v1p0917.jpg. Importantly, the order extended the reservation boundaries to "the low-water mark on the shore of the Gulf of Georgia."[2] *Id.* In other words, President Grant explicitly expanded the reservation to include the tidelands of the relevant area. *United States v. Stotts,* 49 F.2d 619, 619, 621 (W.D. Wash. 1930).

As allowed under President Grant's executive order, the uplands were divided into lots and patented by members of the tribe. Defendants-appellants Keith and Shirley Milner (the "Milners"), Mary Sharp, Brent and Mary Nicholson (the "Nicholsons"), and Ian Bennett and Marcia Boyd ("Bennett/Boyd") (collectively, the "Homeowners") are the successors in interest to some of the parcels derived from these original patents. The Homeowners' parcels all adjoin tidelands on the Strait of Georgia.

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[2] The "Gulf of Georgia" is now known as the Strait of Georgia.

Unlike the Homeowners' properties, the tidelands within the Lummi Reservation have otherwise never been alienated. Plaintiff-appellee the United States claims that it continuously has held the tidelands in trust for the Lummi Nation, pursuant to President Grant's executive order. Not surprisingly, then, it is at the boundary between the tidelands and the uplands that the present dispute finds its locus.

Although each property is slightly different, the Homeowners or their predecessors erected various "shore defense structures" to limit erosion and storm damage to their properties. The structures generally include "rip rap," large boulders used to dissipate the force of incoming waves, and bulkheads placed landward of the rip rap. Between 1963 and 1988, a homeowners' organization (the "Organization") had leased the tidelands from the Lummi Nation, giving waterfront property owners the right to erect shore defense structures on the tidelands; however, once the lease expired, both the Organization and the individual Homeowners declined to renew the lease.

Under federal law, the upper boundary of any tidelands is the mean high water (MHW) line, which is determined by projecting onto the shore the average of all high tides over a period of 18.6 years. *Borax Consol. Ltd. v. City of Los Angeles*, 296 U.S. 10, 26-27 (1935). Over time, the Sandy Point shoreline has eroded significantly, so that as of January 2002, the date of the most recent survey in the record, some of the Homeowners' shore defense structures sat seaward of the MHW line and within the Lummi

tidelands.[3] Given the expiration of the lease, the Homeowners do not have permission from the United States or the Lummi Nation to maintain structures on the tidelands, and they also lack permits to maintain structures in navigable waters of the United States or to discharge fill material into the waters of the United States.

The United States Army Corps of Engineers, and later the United States Attorney for the Western District of Washington, sent letters to the Homeowners demanding removal of the structures or alternatively that the Homeowners enter into agreements to lease the tidelands. When the Homeowners did not remove the structures, the United States filed virtually identical complaints against the separate Homeowners, alleging three causes of action: (1) trespass; (2) violation of § 10 of the Rivers and Harbors Appropriation Act of 1899 (RHA), 33 U.S.C. § 403; and (3) violation of § 301(a) of the Clean Water Act (CWA), 33 U.S.C. § 1311(a).[4] The Lummi Nation intervened in the consolidated action to assert its interest as the beneficial owner of the tidelands.

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[3] Further complicating matters is the fact that the extent of the shore changes seasonally, though mean high water stays relatively constant.

[4] Although the United States originally sued six landowners, the government and the Lummi Nation reached a settlement with one landowner and entered into a consent decree with another.

In a series of partial summary judgment rulings, District Judge Rothstein held that (1) the tidelands were owned by the United States, not the state of Washington; (2) the erosion of the Homeowners' property was not caused by an avulsive event inundating the uplands;[5] and (3) the tideland boundary line was ambulatory and was not arrested by the Homeowners' shore defense structures, so that it lay where the MHW line would be located but for the Homeowners' structures. Judge Rothstein then ruled on summary judgment that the Homeowners were liable for trespass and violation of the RHA, and that the Nicholsons had violated the CWA. Although the United States had sued the other Homeowners for violation of the CWA, it later dismissed those claims against all but the Nicholsons.

After finding liability, Judge Rothstein imposed an injunction under the RHA ordering the Homeowners to remove any shore defense structures located seaward of the MHW line. District Judge Leighton subsequently conducted a bench trial to determine what penalties to impose on the Nicholsons for the CWA violation. He imposed a $1500 fine – far less than what the government sought – and ordered

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[5] Under the doctrine of avulsion, a sudden and abrupt change in the shoreline – an avulsive event – does not alter the boundary line. *New Jersey v. New York*, 523 U.S. 767, 784 (1998); *California ex rel. State Lands Comm'n v. United States*, 805 F.2d 857, 864 (9th Cir. 1986). The Homeowners do not appeal the district court's ruling that the doctrine of avulsion does not apply.

them to remove rip rap below a certain point. Additionally, Judge Leighton heard the Milners' and Bennett/Boyd's motion for attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, which he denied.

The Homeowners timely appealed, challenging the summary judgment rulings on the trespass, RHA, and CWA claims, as well as the injunctive relief imposed by the district court. The Homeowners also argue that the district court erred in denying the EAJA motion. We address these arguments in turn.

II.

The district court had jurisdiction over the trespass claims under 28 U.S.C. § 1345, the RHA claims under 28 U.S.C. §§ 1331, 1345 and 33 U.S.C. § 406, and the CWA claims under 28 U.S.C. §§ 1331 and 1345. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review the district court's grant of summary judgment de novo. *Universal Health Servs., Inc. v. Thompson,* 363 F.3d 1013, 1019 (9th Cir. 2004). We review a district court's grant of injunctive relief for abuse of discretion and will reverse if the district court based its decision on an erroneous legal standard or a clearly erroneous finding of fact. *Fortyune v. American Multi-Cinema, Inc.,* 364 F.3d 1075, 1079 (9th Cir. 2004). The decision whether to award fees under the EAJA also is reviewed for abuse of

discretion. *United States v. Marolf*, 277 F.3d 1156, 1160 (9th Cir. 2002).

III.

A.

Federal common law governs an action for trespass on Indian lands. *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 n.8 (9th Cir. 1994); *see also Oneida County v. Oneida Indian Nation of New York State*, 470 U.S. 226, 235-36 (1985). That law generally comports with the Restatement of Torts, and in any event, Washington law conforms to the Restatement definition of trespass.[6]

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[6] In some instances, "[c]ontroversies governed by federal law do not inevitably require resort to uniform federal rules," and it may be appropriate to borrow from state law for the rule of decision. *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 283 (1982). For example, in *Wilson v. Omaha Indian Tribe*, the Supreme Court held that although federal law determined the question of ownership of land continuously held by the United States for an Indian tribe, state law could be borrowed to provide the applicable rules of avulsion and accretion. 442 U.S. 653, 670-71, 673-74 (1979). While it is clear that the federal common law of trespass applies here, it is less clear whether the application of the common enemy doctrine, discussed below, should be decided based on a uniform federal common law or borrowed Washington state law, which holds that the doctrine does not apply to sea water. *See Grundy v. Thurston County*, 117 P.3d 1089, 1094 (Wash. 2005). We note that it would be anomalous for the *Grundy* decision to apply to other coastal property owners in Washington, yet not to this small group of homeowners. Nevertheless, we need not decide the issue, because we conclude that the common enemy doctrine

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See United States v. West, 232 F.2d 694, 699 (9th Cir. 1956) (citing Arizona case law and the Restatement (First) of Torts to define trespass); *Edwardsen v. Morton*, 369 F. Supp. 1359, 1371 (D.D.C. 1973) (applying Restatement (Second) of Torts to federal trespass action); *United States v. Osterlund*, 505 F. Supp. 165, 167 (D.C. Colo. 1981) (same); *cf. Bradley v. Am. Smelting & Ref. Co.*, 709 P.2d 782, 785 (Wash. 1985) (quoting Restatement (Second) of Torts definition of trespass). Under the Restatement, a person is liable for trespass "if he intentionally . . . causes a thing [to enter land in the possession of another], . . . [or] fails to remove from the land a thing which he is under a duty to remove." Restatement (Second) of Torts § 158 (2009).

The district court found it uncontested that portions of the Homeowners' shore defense structures were seaward of the MHW line and therefore in Lummi tidelands. Nevertheless, the Homeowners make three arguments that they cannot be liable for trespass. First, they argue that Washington state, not the United States, owns the tidelands; therefore, the United States cannot properly assert an action for trespass against them. Second, they contend that because their structures were lawfully built landward of the MHW line – that is, on the Homeowners' property – they cannot be liable for trespass, despite

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is inapplicable regardless of whether *Grundy* provides the federal rule of decision.

the movement of the tideland boundary. Finally, they argue that the elements of intent and causation were not satisfied. We conclude that none of these arguments is correct.

1.

[1] The Homeowners' ownership argument turns on the effect of President Grant's executive order and its force under the "equal footing" doctrine. To put newly admitted states on an "equal footing" with the original states, the doctrine creates a strong presumption that newly admitted states acquire title to lands under navigable waters upon their admission to statehood. *Idaho v. United States,* 533 U.S. 262, 272-73 (2001). The presumption is rebutted (1) if such lands have been reserved by the United States, and (2) if Congress recognizes the reservation in a way that demonstrates an intent to rebut the presumption. *Id.* at 273. According to the Homeowners, because President Grant's executive order could not permanently reserve the tidelands for the Lummi, under the equal footing doctrine, title passed to the state of Washington when it became a state.[7]

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[7] The United States argues that the Homeowners cannot assert Washington state's title in the tidelands because in a trespass action "[t]itle in a third person may not be alleged by a defendant who is not in privity of title with the third person," and the Homeowners do not claim to be in privity with the state. 75 Am. Jur. 2d Trespass § 62 (2009). However, this applies where the plaintiff is the one in possession and, in moving for

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[2] Prior quiet title actions make clear that President Grant's executive order was sufficient to prevent ownership from passing to Washington. In *United States v. Romaine*, the United States sought to quiet title against individuals who had bought Lummi tidelands from the state of Washington. 255 F. 253, 253 (9th Cir. 1919). This court held the president's executive order to be decisive and rejected an argument that the reservation extended only to the high-water mark. *Id.* at 259-60. *Romaine* noted that when Washington was admitted as a state, it disclaimed any right and title

> to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States and said Indian lands

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partial summary judgment on the issue of ownership, the United States did not present evidence showing that it or the Lummi Nation was currently in possession of the tidelands. *See Thomsen v. State*, 422 P.2d 824, 827 (Wash. 1966) ("The presumption of the law that the person who has the possession has the property may not be rebutted by evidence that the property was in a third person, when offered as a defense by one who claims no title and was a wrongdoer.").

The United States' issue preclusion argument is similarly without merit, since the prior cases that the government relies on do not involve the Homeowners and the Homeowners are not subject to the binding effect of the prior judgments. *See Taylor v. Sturgell*, 128 S. Ct. 2161, 2172-73 (2008) (describing the six circumstances in which a nonparty can be bound by a prior decision).

> shall remain under the absolute jurisdiction and control of the Congress of the United States.

Id. at 260 (quoting Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676, 677). *United States v. Stotts* similarly involved a suit by the United States to quiet title in Lummi tidelands purchased from the state. 49 F.2d 619, 619 (W.D. Wash. 1930). Distinguishing *United States v. Holt State Bank,* 270 U.S. 49 (1926), one of the earliest cases establishing the contours of the equal footing doctrine, *Stotts* held that unlike in *Holt* the Lummi had a specific declaration reserving the tidelands for them. *Stotts,* 49 F.2d at 621. *Stotts* also noted that the Treaty of Point Elliott clearly gave the Lummi and other tribes the right to fish in their "usual and accustomed grounds and stations" and that possession of the tidelands was "a necessary perquisite to the enjoyment of fishing." *Id.* at 620-21. In more recent litigation, we again gave effect to the 1873 executive order as definitively establishing the boundaries of the Lummi reservation, including the order's reservation of tidelands. *United States v. Washington,* 969 F.2d 752, 755-56 (9th Cir. 1992). Notably, in *Washington,* the state took the position that the Lummi reservation extends to the low-tide line and did not claim the tidelands. *Id.* at 753. In this lawsuit, the state has expressly declined to claim ownership of the tidelands and to intervene.

[3] We have remarked before that *stare decisis* "applies with special force to decisions affecting title to land," given the special reliance that such decisions

command. *Confederated Salish & Kootenai Tribes v. Namen,* 665 F.2d 951, 960 (9th Cir. 1982); *see also Minnesota* [*Min.*] *Co. v. Nat'l Co.,* 70 U.S. 332, 334 (1865) ("Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change."); *Hart v. Massanari,* 266 F.3d 1155, 1171 (9th Cir. 2001) ("Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court."). The Lummi and homeowners on Sandy Point have long relied on the fact that the Lummi own the tidelands. Until 1988, Homeowners leased the tidelands from the Lummi, with both sides believing that the Lummi owned the tidelands. We see no reason, then, to overturn 90 years of precedent, especially when the supposed title holder has declined to claim ownership.

Additionally, evaluating the executive order against contemporary case law, we find it sufficient to rebut the presumption of the equal footing doctrine. As the Supreme Court has explained, "the two-step test of congressional intent is satisfied when an Executive reservation clearly includes submerged lands, and Congress recognizes the reservation in a way that demonstrates an intent to defeat state title." *Idaho,* 533 U.S. at 273 (citing *United States v. Alaska,* 521 U.S. 1, 41-46, 55-61 (1997) (*Alaska (Arctic Coast)*)). Although "disposals by the United States

during the territorial period are not lightly to be inferred," *Holt State Bank,* 270 U.S. at 55, because the two-step test of congressional intent is met, the tidelands did not pass to Washington upon its admission to statehood.

[4] The first part of the test is easily met. Article VII of the Treaty of Point Elliott provides that "[t]he President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit." 12 Stat. at 929. Thus, in ratifying the Treaty, Congress gave the President the discretionary power to alter the boundaries of the reservation;[8] he later exercised these powers by explicitly extending

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[8] Treaties and other agreements with Indians are liberally construed in favor of the Indians. *Choctaw Nation v. United States,* 318 U.S. 423, 431-32 (1943) ("Of course treaties are construed more liberally than private agreements[ ]. . . . Especially is this true in interpreting treaties and agreements with Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people'" (citations omitted)). The President's power to "remove" the tribes from the specified reservations to "such other suitable place . . . as he may deem fit" therefore encompasses the power to expand the boundaries of the reservation, since the President has the discretion to deem an expanded reservation a suitable replacement for the current one and "remove" the tribes from the smaller reservation to the expanded one.

the reservation to the low-water mark, thereby including the tidelands. *Cf. Alaska v. United States,* 545 U.S. 75, 101-02 (2005) *(Alaska (Glacier Bay))* (finding that executive proclamation reserving submerged lands as part of national monument met first prong of congressional intent test).

[5] When Congress admitted Washington to statehood, it was aware that the President's executive order added the tidelands to the reservation. *See Alaska (Arctic Coast),* 521 U.S. at 45 (finding that the President's executive order "placed Congress on notice that the President had construed his reservation authority to extend to submerged lands and had exercised that authority to set aside uplands and submerged lands in the Reserve"). And while Congress admitted Washington on an equal footing, 25 Stat. at 679, it also recognized the validity of the executive order reservation by requiring Washington state to "forever disclaim all right and title . . . to all lands . . . owned or held by any Indian or Indian tribes." *Id.* at 677. This proviso was written more broadly than Congress's specific recognition of ownership over the National Petroleum Reserve in *Alaska (Arctic Coast), see* 521 U.S. at 41-42, but a broad congressional statement can still be a clear expression of intent. In *Alaska (Glacier Bay)*, the Supreme Court held that an exception that prevented the transfer of "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife" to the state of Alaska was a sufficient indication of intent so as to defeat state title to

submerged lands in the Glacier Bay National Monument. 545 U.S. at 105 (quoting the Alaska Statehood Act, Pub. L. No. 85-508, § 6(e), 72 Stat. 339, 341 (1958)). As in *Alaska (Glacier Bay)*, Congress made it abundantly clear here that Washington would not have title to the lands in question, thereby satisfying the second step of the congressional intent test.

[6] Historically, the Lummi and other Pacific Northwest tribes have depended heavily on fishing and digging for shellfish as a means of subsistence. *See Stotts,* 49 F.2d at 620-21; *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 665-67 (1979). President Grant's reservation of the tidelands thus served to promote the tribe's access to fishing and shellfish, and the welfare of the tribe more generally. Longstanding precedent has established that the tidelands were reserved for the Lummi, and both the tribe and others have relied on this understanding for years. But even were there no such precedent, the executive order reserving the tidelands was promulgated pursuant to congressional authority and subsequently recognized by Congress in a way that indicates a clear intent to prevent title from passing to the state of Washington. We therefore hold that the United States owns the tidelands and holds them in trust for the Lummi.

2.

The problem of riparian and littoral property boundaries is a recurring and difficult issue. These disputes can be especially complicated where the land borders tidal waters, because the waters fluctuate dramatically and because private title claims often have to be balanced against federal and state interests in the ownership and use of the submerged lands. At issue in the Homeowners' second challenge to the trespass claim are two competing common law principles. On the one hand, courts have long recognized that an owner of riparian or littoral property must accept that the property boundary is ambulatory, subject to gradual loss or gain depending on the whims of the sea.[9] *See, e.g., County of St. Clair v. Lovingston,* 90 U.S. 46, 68-69 (1874). On the other hand, the common law also supports the owner's right to build structures upon the land to protect against erosion. *See, e.g., Cass v. Dicks,* 44 P. 113, 114 (Wash. 1896) ("If a landowner whose lands are exposed to inroads of the sea [] . . . erects sea walls or

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[9] While the rights and duties of riparian landowners – those with land fronting a river or stream – can differ from those of littoral landowners – those with property fronting an ocean, sea, or lake – the rules often overlap and sometimes the distinction is elided altogether. *See, e.g., Tusher v. Gabrielsen,* 80 Cal. Rptr. 2d 126, 146-47 (Ct. App. 1998); *Thies v. Howland,* 380 N.W.2d 463, 288 n.2 (Mich. 1985); *but see In re Opinions of the Justices,* 106 A. 865, 868-69 (Me. 1919) (stating that a riparian owner may lower a stream so long as the use is reasonable but that a littoral owner may not draw down a lake below the natural level).

dams for the protection of his land, and by so doing causes the tide, the current, or the waves to flow against the land of his neighbor . . . [he] is not responsible in damages to the latter, as he has done no wrong having acted in self-defense, and having a right to protect his land." (citation omitted)). In this case, the Homeowners' land has eroded away so dramatically that the ambulatory tideland boundary has reached and become fixed at their shore defense structures. While the Homeowners cannot be faulted for wanting to prevent their land from eroding away, we conclude that because both the upland and tideland owners have a vested right to gains from the ambulation of the boundary, the Homeowners cannot permanently fix the property boundary, thereby depriving the Lummi of tidelands that they would otherwise gain.

[7] Under the common law, the boundary between the tidelands and the uplands is ambulatory; that is, it changes when the water body shifts course or changes in volume. *See Jefferis v. East Omaha Land Co.,* 134 U.S. 178, 189 (1890); *California ex rel. State Lands Comm'n v. United States,* 805 F.2d 857, 864 (9th Cir. 1986); *United States v. Boynton,* 53 F.2d 297, 298 (9th Cir. 1931). The uplands owner loses title in favor of the tideland owner – often the state – when land is lost to the sea by erosion or submergence. The converse of this proposition is that the littoral property owner gains when land is gradually added through accretion, the accumulation of deposits, or reliction, the exposure of previously submerged

land. *See County of St. Clair,* 90 U.S. at 68-69; *Jefferis,* 134 U.S. at 189; 65 C.J.S. Navigable Waters § 95 (2009). These rules date back to Roman times, and have been noted in Blackstone's Commentaries and many other common law authorities and cases. *See County of St. Clair,* 90 U.S. at 66-67 (citing *inter alia* the Institutes of Justinian, the Code Napoleon, and Blackstone's Commentaries); John M. Gould, A Treatise on the Law of Waters 306-08 (3d ed. 1900) ("Land formed by *alluvion,* or the gradual and imperceptible accretion from the water, and land gained by *reliction,* or the gradual and imperceptible recession of the water, belong to the owner of the contiguous land to which the addition is made. . . . Conversely land gradually encroached upon by navigable waters ceases to belong to the former owner."); 3 Emory Washburn, A Treatise on the American Law of Real Property 75 (6th ed. 1902) ("[T]he boundary line of an owner's land bordering upon the sea varies with the gradual increase or diminution of quantity by the addition of alluvion, or by the encroachments of the water upon the land, the line of the shore varying accordingly.").

[8] Importantly, the upland owner's right to accretions is a vested right and "rests in the law of nature." *County of St. Clair,* 90 U.S. at 68. It is justified in large part because the upland owner's land is subject to erosion. As the Supreme Court stated in *County of St. Clair,*

> The riparian right to future alluvion is a vested right. It is an inherent and essential

> attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim 'qui sentit onus debet sentire commodum' ['he who enjoys the benefit ought also to bear the burdens'] lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if, a gradual gain, it is his.

Id. at 68-69; *see also Nebraska v. Iowa,* 143 U.S. 359, 360-61 (1892) ("Every proprietor whose land is thus bounded [by water] is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain." (quoting *New Orleans v. United States,* 35 U.S. (10 Pet.) 662, 717 (1836))); *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313, 326 (1973) ("Since a riparian owner is subject to losing land by erosion beyond his control, he should benefit from any addition to his lands by the accretions thereto which are equally beyond his control."), *overruled on other grounds by Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977).

[9] By this logic, both the tideland owner and the upland owner have a right to an ambulatory boundary, and each has a vested right in the potential gains that accrue from the movement of the boundary line. The relationship between the tideland and

upland owners is reciprocal: any loss experienced by one is a gain made by the other, and it would be inherently unfair to the tideland owner to privilege the forces of accretion over those of erosion. Indeed, the fairness rationale underlying courts' adoption of the rule of accretion assumes that uplands already are subject to erosion for which the owner otherwise has no remedy.

Some courts have justified the rule of accretion by noting that it is in the interest of the community that land have an owner and be put to "productive use." *See Bd. of Trustees of the Internal Improvement Fund v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 213 (Fla. Dist. Ct. App. 1973); *Brainard v. State*, 12 S.W.3d 6, 18 (Tex. 1999). While this could be seen as supporting the notion that dry uplands should be valued more than tidelands, we decline to hold that the use of uplands is inherently more valuable than the use to which tidelands can be put. As was already noted, the tidelands have played an important role in the Lummi's traditional way of life, and in most other areas, the tidelands are held by the state in trust for the public. *See Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 436-37 (1892). These interests are substantial, and the uses they represent are not obviously less "productive." *See Shively v. Bowlby*, 152 U.S. 1, 57 (1894) ("[Lands under tide waters] are of great value to the public for the purposes of commerce, navigation, and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right."). Thus, both the

Lummi and the Homeowners must accept that the ambulatory boundary is "an inherent and essential attribute of the original property," *County of St. Clair,* 90 U.S. at 68, and that both the tidelands and the uplands are subject to diminishment and expansion based on the forces of the sea.

[10] The Homeowners concede that the tideland boundary is ambulatory, but only to a point. According to the Homeowners, once the MHW line intersects the face of their defense structures, the boundary becomes fixed and remains so unless the tide line overtops the structures or recedes. The Homeowners rightly note that the common law permits them to erect shore defense structures on their property to prevent erosion. They contend that they lawfully did just that, building landward of the MHW line, and cannot be liable for the movement of the tideland boundary. In particular, the Homeowners draw support for their position from the common enemy doctrine, which provides that "[a] man may raise an embankment on his own property to prevent the encroachments of the sea, although the fact of his doing so may be to cause the water to beat with violence against the adjoining lands, thereby rendering it necessary for the adjoining landowner to enlarge or strengthen his defenses." *Revell v. People,* 52 N.E. 1052, 1059 (Ill. 1898) (quotation marks and citation omitted).

[11] Typically, the common enemy doctrine applies as a defense to nuisance or trespass actions where a property owner has caused surface waters –

the "common enemy" of all landowners – to invade a neighbor's property.[10] *See, e.g., Cass v. Dicks,* 44 P. 113, 114 (Wash. 1896) ("[S]urface water, caused by the falling of rain or the melting of snow, and that escaping from running streams and rivers, is regarded as an outlaw and a common enemy, against which any one may defend himself, even though by doing so injury may result to others."). The doctrine therefore does not apply here. On the one hand, the injury complained of is not the diversion of water onto the tidelands; rather, it is the physical encroachment of the shore defense structures themselves. With the exception of *Revell,* which held that a waterfront

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[10] Many jurisdictions have dispensed with the doctrine altogether and instead apply a rule of reasonableness, under which "each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, but incurs liability when his harmful interference with the flow of surface waters is unreasonable." *Armstrong v. Francis Corp.,* 120 A.2d 4, 8 (N.J. 1956); *see, e.g., Weinberg v. N. Alaska Dev. Corp.,* 384 P.2d 450, 452 (Alaska 1963); *Bunch v. Coachella Valley Water Dist.,* 935 P.2d 796, 801 (Cal. 1997); *Rodrigues v. State,* 472 P.2d 509, 516 (Haw. 1970); *see generally,* Wendy B. Davis, Reasonable Use Has Become the Common Enemy, 9 Alb. L. Envtl. Outlook J. 1, 9-10 (2004) (noting that 21 states have adopted the "reasonable use" rule). While Washington has retained the doctrine, it has modified the rule so that property owners must exercise due care by "acting in good faith and avoiding unnecessary damage to the property of others," *Currens v. Sleek,* 983 P.2d 626, 629-30 (Wash. 1999), and by making the rule inapplicable to sea water. *Grundy,* 117 P.3d at 1094. It is far from clear, then, that the common enemy rule, as advocated by the Homeowners, is even the dominant view.

property owner had no right to erect structures on submerged land owned by the state, 52 N.E. at 1060, all the cases cited by the Homeowners concern disputes over structures diverting waters onto a neighbor's land, not the maintenance of structures on the neighbor's land. *See Lamb v. Reclamation Dist. No. 108,* 14 P. 625, 626-27 (Cal. 1887); *Miller v. Lezerich,* 49 S.W.2d 404, 406 (Tex. 1932). On the other hand, the rule is inapposite because the water is not acting as a "common enemy" of the parties involved. The tide line is an inherent attribute of the properties at issue, since it dictates where the tidelands end and the uplands begin. That the boundary is ambulatory does not make it a common enemy, since any movement seaward or landward is to the benefit of one party and the detriment of the other. It is unfortunate that the boundary line increasingly has encroached on the Homeowners' property, but they cannot claim that the common enemy doctrine allows them to fix permanently the tideland boundary.

[12] The Homeowners have the right to build on their property and to erect structures to defend against erosion and storm damage, but all property owners are subject to limitations in how they use their property. The Homeowners cannot use their land in a way that would harm the Lummi's interest in the neighboring tidelands. Given that the Lummi have a vested right to the ambulatory boundary and to the tidelands they would gain if the boundary were allowed to ambulate, the Homeowners do not have

the right to permanently fix the property boundary absent consent from the United States or the Lummi Nation. The Lummi similarly could not erect structures on the tidelands that would permanently fix the boundary and prevent accretion benefitting the Homeowners. Although the shore defense structures may have been legal as they were initially erected, this is not a defense against the trespass action nor does it justify denying the Lummi land that would otherwise accrue to them.

[13] We emphasize that this does not mean property owners cannot erect shore defense structures on their property or take other action to prevent erosion. Nor does it mean that the Homeowners must necessarily remove their structures, if they can reach an agreement with the Lummi Nation and the United States that allows the structures to remain. Rather, we hold only that the Homeowners have no defense to a trespass action because they are seeking to protect against erosion.[11] Once the shore has eroded so

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[11] Amicus curiae Building Industry Legal Defense Foundation ("BILD") argues that such a rule will have dramatically harmful consequences, given the many coastal properties with shore defense structures. This overestimates the reach of our opinion, however. Because of the equal footing doctrine and the Submerged Lands Act, 43 U.S.C. § 1311, the states hold title to most of the tidelands. Most disputes that arise between the states and littoral property owners over tideland boundaries and the use of tidelands are ultimately a matter for state courts to adjudicate under state law. The states, of course, must consider the public interest – not just those of waterfront property owners – in deciding how to manage their tidelands, as they

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dramatically that the property owner's shore defense structures fix the ambulatory boundary, the upland owner cannot expect to permanently maintain the boundary there without paying damages to the tideland owner or working out an agreement with the tideland owner. Homeowners on Sandy Point previously had leased the tidelands from the Lummi, and there is no reason the Homeowners could not similarly seek to negotiate a new agreement now.

3.

It is undisputed that as of the 2002 survey, some of the Homeowners' shore defense structures sat seaward of the MHW line. The Homeowners nevertheless argue that they cannot be liable for trespass because they did not intend the structures to trespass and because the trespass was caused by the erosion of the shore and resulting movement of the boundary, not by the Homeowners.

[14] However, as the district court noted, to be liable for trespass, the Homeowners need not have intended the actual trespass. Rather, the intent requirement is satisfied because the government requested that the encroaching parts of the structures

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already have been doing. As with many property disputes, those between tideland holders and littoral property owners will not be easy to resolve and they may simply require the parties to compromise, even if that means not everyone is entirely satisfied with the results.

be removed, but the Homeowners failed to do so. *See New York State Energy Research & Dev. Auth. v. Nuclear Fuel Servs., Inc.*, 561 F. Supp. 954, 974 (W.D.N.Y. 1983) ("In the case of trespass through the continuing presence of chattels on another's land, the requisite intent does not arise until the duty to remove the chattels arises, which does not occur until a demand for removal has been made."); *see also* Restatement (Second) of Torts § 161; 75 Am. Jur. 2d Trespass § 19 (2009) ("A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing that the actor or a predecessor in legal interest has placed on the land and failed to remove."). And although the Homeowners did not cause the movement of the boundary line, they can still be liable for the structures even after the boundary moved across the structures. It is enough that the Homeowners caused the structures to be erected and that the structures subsequently rested on the tidelands. *See* Restatement (Second) of Torts § 161, cmts. b, e.

[15] Given that the United States, not Washington, holds title to the tidelands and that the Homeowners cannot permanently fix the tideland boundary, it quickly follows that the Homeowners are liable for trespass. The district court was correct, then, in finding in favor of the United States and Lummi Nation as to the trespass claim.

B.

[16] Turning next to the RHA claim, there are three ways in which a defendant could violate § 10 of the RHA. The first clause of § 10 prohibits the creation of "any obstruction not affirmatively authorized by Congress[ ] to the navigable capacity of any of the waters of the United States." 33 U.S.C. § 403. Clauses two and three respectively make it unlawful to "build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army" or to "excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of . . . the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." *Id.*

Under the RHA the navigable waters of the United States means "all places covered by the ebb and flow of the tide to the mean high water (MHW) mark in its unobstructed, natural state." *Leslie Salt Co. v. Froehlke,* 578 F.2d 742, 753 (9th Cir. 1978); *see also* 33 C.F.R. §§ 322.2(a), 329.4, 329.12(a)(2). Notably, courts have "consistently found [the RHA's] coverage to be broad," *Wyandotte Transp. Co. v. United States,* 389 U.S. 191, 201 (1967); *see also Sanitary Dist. Co. of Chicago v. United States,* 266 U.S. 405,

429 (1925) (calling the RHA "a broad expression of policy in unmistakable terms"), and "read the [RHA] charitably in light of the purpose to be served." *United States v. Republic Steel Corp.*, 362 U.S. 482, 491 (1960).

The Homeowners concede that they do not have authorization to maintain structures in the navigable waters of the United States. Given that at least some of their shore defense structures lie seaward of the MHW line, the issue on appeal is whether the district court properly ruled that the Homeowners had violated § 10 by not removing their shore defense structures from the tidelands.

[17] Although § 10 does not explicitly mention the maintenance of structures in navigable waters, in the sense of keeping structures in place, we have interpreted the RHA as making unlawful the failure to remove structures prohibited by § 10, even if they were previously legal. *See United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1167 (9th Cir. 2000) ("Gateway's assertion that the Corps cannot remove a lawfully erected structure is equally unavailing. . . . the RHA allows the United States to remove structures that were once erected lawfully but subsequently found to be obstructions."). This makes sense in light of the RHA's concern with insuring that navigable waterways remain free of obstruction, because even initially legal structures can subsequently interfere with navigation. *See, e.g., United States v. New York Cent. R.R.*, 252 F. Supp. 508, 511 (D. Mass. 1965) (finding landward remnants of previously legal

bridge an obstruction), *aff'd per curiam,* 358 F.2d 747 (1st Cir. 1966). The Homeowners' structures may have been legal as initially built, but because of the movement of the tidal boundary they now sit in navigable waters and are obstructions.[12]

[18] The Homeowners argue that *Alameda Gateway* is inapplicable, because it concerns the first clause of § 10, and, according to them, the shore defense structures do not interfere with navigation. However, structures violating clauses two or three are presumed to be obstructions under the first clause. *Alameda Gateway,* 213 F.3d at 1165; *Sierra Club v. Andrus,* 610 F.2d 581, 596 (9th Cir. 1979), *rev'd on other grounds sub nom. California v. Sierra Club,* 451 U.S. 287 (1981) (holding that there is no implied private right of action under § 10 and thus declining to reach the merits). That is, clauses two and three have been interpreted as "a legislative enumeration of specific obstructions to navigable capacity that require Corps authorization" to be legal, *Andrus,* 610 F.2d at 594, with the Corps having discretion to "determine what in the particular cases constitute[s] an unreasonable obstruction." *Id.* at 596 (quoting *Wisconsin v. Illinois,* 278 U.S. 367, 413 (1929)). There

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[12] The Corps' regulations confirm that structures may be obstructions without regard to how the structures came to be in navigable waters. The Corps generally requires a permit "for structures and/or work in or affecting navigable waters," without reference to whether the structure is being initially erected in navigable waters or has already been sitting there. 33 C.F.R. § 322.3(a).

is no need, then, for the Corps or the courts to determine first that the Homeowners' structures obstruct navigable capacity, since the structures obviously qualify as a "breakwater, bulkhead, . . . or other structure" under clause two and modify the course, location, condition, and capacity of the Strait under clause three. 33 U.S.C. § 403. The Homeowners are therefore required to have Corps authorization; because they have maintained their structures in the tidelands without such authorization, they can be liable under the RHA.

BILD argues that under the RHA navigable waters do not extend to the MHW line in its "unobstructed, natural state," because *Leslie Salt* stated that this jurisdictional line "is dictated by the principle . . . that one who develops areas below the MHW line does so at his peril." 578 F.2d at 753. According to BILD, since the Homeowners claim they built above the MHW line, *Leslie Salt* is inapplicable. On the one hand, whether navigable waters reach the MHW in its unobstructed state or in its obstructed state is irrelevant here, because the Homeowners are liable either way. The topographic survey maps submitted by the government show that at least some rip rap from the shore defense structures sits below the MHW line, and that rip rap has not so obstructed the movement of the tide that it is prevented from flowing landward of this scattered rip rap. So even assuming an obstruction could prevent the movement of the MHW line under the RHA, the Homeowners have still violated clause two of § 10.

On the other hand, this argument ignores the RHA's central concern, which is to insure that the nation's waterways remain navigable and free of obstruction. The nation's navigable waterways, of course, can change, and with it the Corps' jurisdiction. *See, e.g., Swanson v. United States,* 789 F.2d 1368 (9th Cir. 1986) (finding Corps had jurisdiction over subsequently flooded area). Structures that were previously above the MHW line can become subject to Corps' regulation because the tide line has moved, and if those structures prevent the MHW line from achieving its unobstructed, natural state they can pose a serious risk to navigation. A structure should not be exempt from regulation because it so significantly displaces navigable waters that the waters are permanently penned in. Just as one who develops below the MHW line "does so at his peril," those who build too close to the MHW line also run the risk that their structures eventually may become obstructions and be subject to regulation by the Corps.[13]

[19] The Homeowners' structures additionally violate clause three of § 10, without regard to whether or not one considers the waters in their unobstructed state. In certain circumstances a structure

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[13] As in *Leslie Salt,* we express no opinion as to whether or at what point the government may be estopped from asserting its jurisdiction because land has long ago been filled in, as was the case in *United States v. Stoeco Homes, Inc.,* 498 F.2d 597, 610-11 (3d Cir. 1974). *See* 578 F.2d at 753. There is no indication here that the United States excessively delayed its enforcement efforts.

or activity can still be a violation of clauses one or three of § 10 even if the structure or activity is not located in navigable waters. *See United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1298 (5th Cir. 1976). As the Fifth Circuit has put it, for the most part § 10 has "no locality assigned to its prohibitions." *Id.*

> It prohibits any obstruction to navigable capacity. There is no suggestion that an obstruction whose source is above [the MHW line] escapes prosecution. It prohibits the alteration or modification of the course, condition, location or capacity of a navigable water. There is not the slightest intimation that an alteration or modification whose source is above [the MHW line] is any less an alteration or modification. There is nothing in the language of the statute nor the logic of its implementation which creates this barrier beyond which the Corps is ubiquitously powerless. Indeed, such a limitation would thwart the design of the statute.

Id. at 1298-99; *see also* 33 C.F.R. § 322.3(a) ("Structures or work outside [the navigable waters of the United States] are subject to [§ 10] if these structures or work affect the course, location, or condition of the waterbody in such a manner as to impact on its navigable capacity."). Under clause three, even though the tide line does not extend past the Homeowners' shore defense structures because the Homeowners have successfully prevented the Strait from advancing landward, the structures "alter or modify the course,

location, condition, or capacity of" the Strait, since the flow of the waters is limited by the structures. 33 U.S.C. § 403. The Homeowners are therefore liable on this alternative basis as well.

[20] Because the Homeowners have maintained at least part of their shore defense structures below the MHW line, and because the structures alter the course, location, condition, or capacity of the Strait, they are required to obtain Corps' authorization or face liability. Contrary to the Homeowners' claim, they need not have intended to violate the RHA; it is sufficient under *Alameda Gateway* that they intentionally erected structures that became obstructions. *See* 213 F.3d at 1167. The district court therefore appropriately found liability, and its imposition of an injunction under § 12 of the RHA, 33 U.S.C. § 406, was not an abuse of discretion, given the standard for injunctions under § 12. *See United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974) ("No balancing of interest or need to show irreparable injury is required when an injunction is sought under § 12 to prevent erection or seek removal of an unlawful structure.").

C.

[21] The CWA prohibits the discharge of any dredged or fill material into "navigable waters" unless authorized by the Corps. *See* 33 U.S.C. §§ 1311, 1344. However, the scope of the Corps' regulatory authority under the CWA and RHA is not the same,

in part because the definition of "navigable waters" is broader under the CWA and encompasses all "waters of the United States." 33 U.S.C. § 1362(7); *Leslie Salt*, 578 F.2d at 754-55. Instead of using the MHW line, the Corps' regulations define its CWA jurisdiction over tidal waters by reference to the "high tide line," 33 C.F.R. § 328.4(b)(1), which, in turn, is defined as "the line of intersection of the land with the water's surface at the maximum height reached by a rising tide."[14] 33 C.F.R. § 328.3(d).

The district court found on summary judgment that the Nicholsons had violated the CWA, because, in the course of reconstructing their shore defense structures, they discharged fill material below where the high tide line would fall in its unobstructed, natural state without a permit. In so ruling, the district court again relied on the holding from *Leslie Salt* that "the MHW line is to be fixed in accordance with its natural, unobstructed state." 578 F.2d at 753.

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[14] Locally, the policy of the Seattle District of the Corps has been to draw the high tide line at the mean higher high water (MHHW) line, which is calculated by averaging over 18.6 years the highest of the two high tides that occur in a day and projecting that line onto the shore. *Leslie Salt*, 578 F.2d at 746. Because the two daily Pacific coast tidal cycles can vary greatly in height, the difference between the MHHW line and the MHW line – the average of both high tides occurring in a day – can be relatively large on the west coast of the United States. *Id.* In fashioning a remedy for the CWA violation, Judge Leighton took the Corps' local enforcement policy into account, but, contrary to the government's position, this does not necessarily conflict with what Judge Rothstein found on summary judgment.

However, while *Leslie Salt* applied this rule to the definition of navigable waters under the RHA, it was more circumspect as to what the limits of navigable waters and the Corps' jurisdiction are under the CWA. The district court in *Leslie Salt* had held that navigable waters under the CWA extended to the MHHW line in its unobstructed, natural state. *Sierra Club v. Leslie Salt Co.*, 412 F. Supp. 1096, 1103 (N.D. Cal. 1976). But we declined to hold that the waters of the United States extended to all places the water would theoretically reach, partially out of concerns that such a ruling swept too broadly and unnecessarily included "fast land" or "improved solid upland." *See Leslie Salt,* 578 F.2d at 754. Since we could decide *Leslie Salt* by addressing only whether the particular waters in question were subject to regulation by the Corps, we did not address the ultimate question of what constitutes the outer limit of the Corps' CWA jurisdiction. *Id.* at 756.

[22] This case presents more squarely the question of how far the Corps' CWA jurisdiction extends. *Leslie Salt* addressed whether certain waters diked off from the San Francisco Bay constituted waters of the United States. 578 F.2d at 756. Here there is a question as to whether any water actually reaches the area at issue, and if not, whether it is still subject to regulation by the Corps. The parties in *Leslie Salt* agreed that the Corps' jurisdiction does not extend to property that was dry, solid upland as of the date of the passage of the CWA. *See id.* at 754. In the same vein, the Corps has stated that it does not

intend to assert jurisdiction over lands that once were submerged but which have been transformed into dry land. *See* 42 Fed. Reg. 37128 (July 19, 1977). While we do not purport to decide the full extent of the Corps' CWA regulatory authority, we find this approach persuasive. Any discharge on fast land would not actually be in the waters of the United States, and it would be potentially unfair to occupants of such land to hold them to the strictures of the CWA if the land has long been dry. Even if land has been maintained as dry through artificial means, if the activity does not reach or otherwise have an effect on the waters, excavating, filling and other work does not present the kind of threat the CWA is meant to regulate.

[23] This does not mean that fast land cannot subsequently become submerged by the waters of the United States. As the Corps' regulations acknowledge, gradual changes to the bed of a body of water will change the boundaries of the waters of the United States. 33 C.F.R. § 328.5. But if land was dry upland at the time the CWA was enacted, it will not be considered part of the waters of the United States unless the waters actually overtake the land, even if it at one point had been submerged before the CWA was enacted or if there have been subsequent lawful improvements to the land in its dry state.[15] In short,

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[15] This would not change the fact that waters which were in the past navigable are still considered such, even if they are no longer navigable in fact. *See United States v. Appalachian Elec.*

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in such a situation, the waters of the United States are demarcated by the reach of the high tide line, but not as it would be in its unobstructed, natural state if the fill or obstruction was in place at the time the CWA was enacted or if there was a legally authorized filling or improvement done after the enactment of the CWA.

[24] Applying that boundary here, it is unclear from the evidence presented at summary judgment whether the high tide line actually reached the area where the Nicholsons excavated and filled. Pictures of the bulkhead reconstruction show that the rip-rap revetment seaward of the bulkhead may have successfully prevented the tide from reaching the area under construction. The construction diagrams show an intent to excavate to a depth that would be below the high tide line if one ignored the existence of the

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Power Co., 311 U.S. 377, 408 (1940) ("When once found to be navigable, a waterway remains so."); 33 C.F.R. § 328.3(a)(1). We also reiterate *Leslie Salt's* admonition that the full extent of the Corps' CWA jurisdiction over waters of the United States "is in some instances not limited to the MHW or the MHHW line." *Id.* at 742. For example, where there are adjacent wetlands or intermittent streams, the Corps still has jurisdiction, even though these areas are beyond the normal ebb and flow of the tide. *See, e.g., United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985); *United States v. Moses*, 496 F.3d 984, 989 (9th Cir. 2007). Additionally, some discharges on dry land can be CWA violations. *See Leslie Salt*, 578 F.2d at 753 n.12 (citing *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974), as an example of a discharge above MHHW line that violated CWA).

revetment. But if the revetment was in place prior to the enactment of the CWA or legally built on dry land after the passage of the CWA, then it must be considered as it actually exists. While the parties seem to agree that the revetment was built in 1982 by the Nicholsons' predecessor in interest, on summary judgment the government did not present evidence showing that the revetment was not lawfully built on dry land beyond the reach of the high tide line. There was also no evidence that during the reconstruction of the bulkhead, the Nicholsons placed additional rip rap seaward of the revetment or that their activities otherwise led to the discharge of material below the high tide line, as it actually existed. The government therefore did not carry its burden of showing that the Nicholsons had violated the CWA by discharging material into waters of the United States. Accordingly, we reverse the grant of summary judgment on this claim and remand for further proceedings.

Although the CWA's jurisdictional reach is generally broader than the RHA's, the reversal here is explained by the RHA's concern with preventing obstructions, on the one hand, and the CWA's focus on discharges into water, on the other. Since the two laws serve different purposes, their regulatory powers will diverge in some circumstances, as is the case here. Under the RHA, it is appropriate to ignore an obstruction's ability to stop the flow of navigable water, because the purpose of the RHA is precisely to prevent or remove obstructions to navigable waters. The Homeowners' structures clearly impinge on the

capacity of the Strait of Georgia and portions of them sit within navigable waters; they are therefore obstructions. The CWA, on the other hand, is designed to restore and maintain the integrity of the nation's waters, which it does by limiting the discharge of pollutants into the waters. *See* 33 U.S.C. § 1251(a). The Nicholsons' activities in reconstructing their bulkhead, however, would not involve a discharge into waters of the United States if conducted solely on fast land. The revetment fronting their bulkhead may have prevented the MHHW line from reaching the construction work – and thereby prevented a discharge into navigable waters – while at the same time obstructing those waters. It is perfectly consistent, then, that the Homeowners could be liable under the RHA while the Nicholsons may not be liable under the CWA.

D.

Finally, for the court to award attorney's fees and costs under the EAJA, it must be shown that (1) the party seeking fees is the prevailing party; (2) the government has not met its burden of showing that its positions were substantially justified or that special circumstances make an award unjust; and (3) the requested fees and costs are reasonable. *See Perez-Arellano v. Smith,* 279 F.3d 791, 793 (9th Cir. 2002).

[25] To be a prevailing party, the party must have received an enforceable judgment on the merits

or a court-ordered consent decree. *Id.*; *see Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001) ("[E]nforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." (citation omitted)). The Milners and Bennett/Boyd stipulated to the government's dismissal, without prejudice,[16] of the CWA claims against them. However, although a defendant may no longer have a claim pending against him or her upon dismissal, a dismissal without prejudice does not materially alter the legal relationship of the parties, because the defendant remains subject to the risk of re-filing. *Oscar v. Alaska Dep't of Educ. & Early Dev.*, 541 F.3d 978, 981 (9th Cir. 2008); *Cadkin v. Loose*, 569 F.3d 1142, 1149 (9th Cir. 2009). Although *Oscar* and *Cadkin* concern fee-shifting statutes other than the EAJA, they turn on the meaning of the term "prevailing party" and govern our interpretation here. *See Perez-Arellano*, 279 F.3d at 794 (noting that *Buckhannon* "sweeps . . . broadly and its reasoning is persuasively applicable to an award of attorney's fees under the EAJA"); *Oscar*, 541 F.3d at 981 (relying on *Buckhannon* to determine whether a defendant is a prevailing party); *Cadkin*, 569 F.3d at 1149 (same). We therefore

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[16] Since the stipulation did not state that the dismissal was with prejudice, it was without prejudice. Fed. R. Civ. Proc. 41(a)(1)(B).

conclude that the Milners and Bennett/Boyd are not prevailing parties and are not entitled to attorneys' fees under the EAJA.

IV.

Although this particular dispute has been ongoing for some years now, for an even longer period of time, the Homeowners on Sandy Point had an agreement with the Lummi Nation to lease the tidelands. This allowed the upland owners to construct and maintain bulkheads, rip rap, and other shore defense structures on the tidelands in order to protect their property. The Sandy Point Homeowners had an opportunity to renew the lease for an additional 25 years, the maximum lease term allowed for Indian trust lands. 25 U.S.C. § 415. Additionally, throughout this litigation the Lummi have expressed a desire to negotiate a new agreement, and at least before commencement of this suit, the United States indicated that its concerns would be satisfied if the Homeowners entered into agreements with the Lummi.

This action was avoidable. Perhaps the parties still will be able to reach an amicable settlement. However, because the Homeowners have so far been unable or unwilling to negotiate an agreement with the Lummi, we must pass on the merits of the dispute. For the reasons set forth above, we affirm the district court's decisions on the trespass and RHA claims, and its decision not to grant fees under the

EAJA. We find that the government did not carry its burden on the CWA claim against the Nicholsons; we therefore reverse on that claim.

Each party is to bear its own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

United States District Court
WESTERN DISTRICT OF WASHINGTON

FRCP 54(b)
JUDGMENT IN A CIVIL CASE

(Filed Sep. 20, 2005)

UNITED STATES OF AMERICA,
on its own behalf and as trustee
on behalf of the Lummi Nation

v.

MARY D. SHARP, KEITH E. MILNER and SHIRLEY A. MILNER, IAN C. BENNETT and MARCIA A. BOYD.

CASE NUMBER:
C01-0809RBL

[✓] **Decision by Court.** This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Upon the Stipulation of the parties, the Court has determined that there is no just reason for delay and upon an express direction for the entry of judgment, FRCP 54(b), it is **ORDERED** that

Judgment be entered in favor of Plaintiff United States of America and Plaintiff-Intervenor Lummi Indian Nation against only Mary D. Sharp, Keith E. Milner and Shirley A. Milner, Ian C. Bennett and Marcia A. Boyd.

DATED: SEPTEMBER 20, 2005

/s/ BRUCE RIFKIN
Clerk

/s/ Jean Boring
(By) Deputy Clerk

United States District Court
WESTERN DISTRICT OF WASHINGTON

JUDGMENT IN A CIVIL CASE

(Filed Jun. 14, 2005)

UNITED STATES OF AMERICA,
on its own behalf and as trustee
on behalf of the Lummi Nation

v.

KEITH E. MILNER
and SHIRLEY A. MILNER,

CASE NUMBER:
C01-0809RBL

[✓] **Decision by Court.** This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The Court has determined that there is no just reason for delay and upon an express direction for the entry of judgment, FRCP 54(b), it is **ORDERED** that

Based on the Findings and Conclusions, the court in its discretion Orders as Follows:

(1) The Nicholsons shall pay a penalty of $1,500.00 for their previously adjudicated violation of the Clean Water Act.

(2) The Nicholsons shall, within 90 days of the date of the order, remove the riprap which is located below the MHHWL as shown on the Government's 2002″ survey, Exhibit A-40, UNLESS they apply for and obtain the

necessary "after the fact" CWA permit from the Corps. If an application is filed within 90 days of the date of this Order, this injunctive portion of the order will be stayed until 60 days after that application is ruled upon by the Corps.

(3) This Order shall be stayed pending appeal of this final Order, on the condition that the Nicholsons continue to pay the Lummi Nation fair market value for their use of the tideland below MHWL.

DATED: JUNE 14, 2005

/s/ BRUCE RIFKIN
Clerk

/s/ Jean Boring
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiffs, v. KEITH E. MILNER and SHIRLEY A. MILNER, et al., Defendants, THE LUMMI NATION, Intervenor-Plaintiff.	NO. C01-809R ORDER GRANTING PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT RE: TRESPASS AND RHA CLAIMS (Filed Jun. 18, 2003)

THIS MATTER comes before the court on Plaintiffs' motions for summary judgment. Having reviewed the pleadings filed in support of and in opposition to these motions, the court finds and rules as follows:

I. BACKGROUND

Defendants Keith E. and Shirley A. Milner, Mary D. Sharp, Brent C. and Mary K. Nicholson, and Ian C. and Marcia A. Boyd own beachfront property

on Sandy Point, in Whatcom County, Washington.[1] Defendants' property is fronted by various shore defense structures that allegedly encroach on tidelands on the Strait of Georgia that are owned by the United States in trust for the Lummi Nation. The United States also alleges that these structures are being maintained in violation of the Rivers and Harbors Act ("RHA").[2] Together, the United States and Lummi Nation move for summary judgment on the trespass claim. The United States moves separately for summary judgment on its RHA claim.

II. DISCUSSION

A. Summary judgment standard

Summary judgment is appropriate when "the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). While the moving party has the initial burden to establish the absence of any genuine issues of fact, the nonmoving party "must do more than simply

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[1] Defendants Harry F. Case and Donald C. and Gloria Walker are not involved in this motion as they have reached a settlement in principle with the government. That settlement, however, has not yet been approved by the Assistant Attorney General. Consequently, the United States reserves the right to move against these defendants in the future.

[2] A third cause of action under the Clean Water Act is not at issue in these motions.

show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the nonmoving party must respond by "set[ting] forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(c). "Where the record as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec.*, 475 U.S. at 587.

B. Liability for trespass

The parties agree that the federal law of trespass applies in this case. *See United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1550 n.8 (9th Cir. 1994) (federal law applies to trespass cause of action protecting Indian lands); *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 236 (1985). That law generally comports to the Restatement of Torts. *See United States v. West*, 232 F.2d 694, 699 (9th Cir. 1956) (adopting Restatement (First) of Torts for operative definition of federal trespass); *U.S. v. Osterlund*, 505 F. Supp. 165, 167 (D.C. Colo. 1981). Under the Restatement, a person trespasses when he "intentionally . . . causes a thing [to enter another's land] . . . remains on the land or . . . fails to remove from the land a thing which he is under a duty to remove." *Restatement (Second) of Torts* § 158.

In the present case, uncontested topographic maps demonstrate that as of January 2002, portions of Defendants' shore defense structures were seaward

of the line of mean high water, which this court has determined to be Defendants' boundary line. Ex. 1, United States Mot. Summ. J.; Order Granting United States' and Harry F. Case's Motion for Partial Summary Judgment at 6 (Dec. 16, 2002). Despite having received notice from the government that these structures are on United States land, Exs. 3-10, United States' Mot. Summ. J.,[3] Defendants have not removed them. Nor do Defendants present any specific evidence that the shore defense structures are not currently encroaching on the government's land. Instead, Defendants merely state in a conclusory fashion that since January 2002, the boundary has shifted such that their shore defense structures do not currently encroach. Absent any such specific evidence, however, Defendants fail to create a genuine issue of fact as to whether the shore defense structures are currently encroaching. *Matsushita Elec.*, 475 U.S. at 586 (nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts").

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[3] Defendants object to these exhibits, which consist of letters from the Army Corps of Engineers and the Department of Justice to individual defendants and excerpts of various Defendants' depositions, as being inadmissible hearsay and improperly authenticated. These items, however, are not hearsay as they are not offered for the truth of the matter that Defendants are trespassing but rather that they received demands by the government to remove the allegedly offending structures.

Instead, Defendants attempt to persuade the court that they cannot be held liable for trespass because they never intended their shore defense structures to encroach onto the tidelands.[4] According to Defendants, the ambulatory nature of the boundary was the cause of the trespass. Defendants liken their situation to the party in a Restatement illustration who piles logs on his land by the side of a stream well above the high-water mark, which are subsequently carried away by an unprecedented freshet. In the illustration, that party is not liable to a party down-stream on whose lands the logs are deposited. *Restatement (Second) of Torts,* § 166 ill. 3. According to Defendants, all of their shore defense structures were originally placed on their own property with subsequent natural events creating the trespass.

Defendants, however, overlook the fact that to be liable, they need not have necessarily intended the actual trespass but that it is enough that they (or their predecessors[5]) acted with knowledge that constructing the shore defense structures would, with substantial certainty, result in entry of portions of the structures onto the tidelands. *Id.* § 158 cmt. i. In the

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[4] Defendants have failed to persuade the court with this argument on at least two previous occasions.

[5] The Defendants are liable for trespass even in the case where their predecessors tortiously placed the structures and the Defendants fail to remove them. *Restatement (Second) of Torts* § 161(2).

present case, as littoral owners, Defendants took their property "with the knowledge that the boundary may change by accretion or reliction." *Michaelson v. Silver Beach Improvement Ass'n*, 173 N.E.2d 273, 278 (Mass. 1961). Defendants, therefore, are more like "one who so piles sand close to his boundary that by force of gravity alone it slides down onto his neighbor's land, or who so builds an embankment that during ordinary rainfalls the dirt from it is washed upon adjacent lands," *Restatement (Second) of Torts* § 158 cmt. i, than they are like one who piles logs in the face of an *unprecedented* freshet.[6]

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[6] Defendants contend that they are not liable for trespass under the common enemy doctrine. Under that doctrine, a landowner is entitled to build structures to repel the erosive effects of water. A landowner who builds such structures is generally not held liable for trespass when the consequences and effects of those structures injure another's property. That is not the case at bar, however, because Defendants' shore defense structures themselves are physically located on the government's property. Under the common enemy doctrine, a landowner is simply not entitled to enter onto another's land in order to build or maintain his defensive structures.

Similarly, the cases that Defendants amass for the proposition that there can be no trespass when acts taken on one's own property cause unintended harm to another's property are inapposite. *See Cannon v. Dunn*, 700 P.2d 502 (Ariz. 1985); *Hicks v. Drew*, 49 P. 189 (Cal. 1897); *Schulze v. Monsanto Co.*, 782 S.W.2d 419 (Mo. App. 1989). As above, none of these cases sanction an actual physical encroachment but rather only consider a "constructive" trespass whereby affects and consequences cause injury to land.

Defendants also overlook the fact that they have failed to remove the encroaching parts of the shore defense structures even after the government requested them to do so. In such a situation, the intention element is satisfied. *New York State Energy Research and Dev. Auth. v. Nuclear Fuel Servs., Inc.*, 561 F. Supp. 954, 974 (W.D.N.Y. 1983) ("In the case of trespass through the continuing presence of chattels on another's land, the requisite intent does not arise until the duty to remove the chattels arises, which does not occur until a demand for removal has been made."). Accordingly, Defendants are liable for trespass.

C. Liability under RHA

Section 10 of the RHA makes it unlawful "to build or commence the building of any . . . breakwater, bulkhead . . . or other structures in any . . . water of the United States . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army." Section 10 also makes it unlawful "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of . . . the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." 33 U.S.C. § 403.

Courts have interpreted Section 10 to also make unlawful the maintenance of structures restricted by

the Act.[7] *United States v. Alameda Gateway, Ltd.*, 953 F. Supp. 1106, 1110 (N.D. Cal. 1996) ("To deem the RHA inapplicable to pre-existing structures would sharply restrict the ability of the government to preserve the public interest in maintaining unimpeded access to the navigable waters of the United States."); *see also United States v. Alameda Gateway, Ltd.*, 213 F.3d 1161, 1167 (9th Cir. 2000) (holding that the RHA allows the United States to remove structures that were once erected lawfully but subsequently found to be obstructions). Given that Defendants are maintaining the structures (i.e. they have not removed

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[7] Defendants contend that they cannot be liable under the RHA because they did not intend to obstruct any navigable water or build any structure in a navigable water. Their citation to *U.S. v. Ohio Barge Lines, Inc.*, 607 F.2d 624 (3d Cir. 1979) and *United States v. Bigan*, 274 F.2d 729 (3d Cir. 1960) for the proposition that the RHA requires some intent and active contribution to the erection of the obstruction is unpersuasive in light of recent Ninth Circuit case law.

A similar argument to Defendants was rejected by the court in *United States v. Alleyne*, 454 F. Supp. 1164 (D.C.N.Y. 1978). In that case, the court clarified the nature of the "intent" needed to be liable under Section 10. According to the court, "it is [not] necessary that the purpose be to create an obstruction, but that such a result is reasonably to be apprehended from the acts actually intended wholly irrespective of whether or not there was a design to create an obstruction to navigation." 454 F. Supp. at 1171 (quoting *United States v. Bridgeport Towing Line, Inc.*, 15 F.2d 240, 241 (D. Conn. 1926). Consequently, all that is necessary is that the obstruction to navigation be "reasonably foreseeable." *Id.* In the present case, it was reasonably foreseeable that erosion would one day impact the shore defense structures so that they would be located seaward of MHW and be considered obstructions to navigation.

them), they are liable under the RHA for those parts of the structures that are below MHW. *See Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 753 (9th Cir. 1978) (holding that "in tidal areas, 'navigable waters of the United States,' as used in the Rivers and Harbors Act, extend to all places covered by the ebb and flow of the tide to the mean high water (MHW) mark in its unobstructed, natural state"). Furthermore, the structures also modify the course, location, and condition of a navigable water.

As demonstrated by the topographic maps submitted by the government, as of January 2002, parts of Defendants' shore defense structures lie seaward of MHW in its natural and unobstructed state. Consequently, the Defendants are liable for violations of the RHA.[8]

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[8] Defendants misread Section 10 to require a showing that the shore defense structures actually obstruct the navigable capacity of the Strait of Georgia. Instead, the structures listed in the second and third clauses of Section 10 (i.e. bulkheads, breakwaters, and other structures) "are presumed to be obstructions to navigable capacity. . . . When one undertakes any of the activities described in clause 2 or by his activities brings about any of the results specified in clause 3, he violates Section 10 if he has not first sought and obtained a permit from the Corps of Engineers." *Sierra Club v. Andrus*, 610 F.2d 581, 594-95 (9th Cir. 1979), *rev'd other grounds sub nom. California v. Sierra Club*, 451 U.S. 287 (1981). "[T]o fall within the prohibition of clause 2, it need only be shown that the subject in question is one of those enumerated in Section 10." *United States v. Boyden*, 696 F.2d 685, 688 (9th Cir. 1983); *see also United States v. Joseph G. Moretti Inc.*, 478 F.2d 418, 429 (5th Cir. 1973) ("any argument that the filling of navigable waters

(Continued on following page)

D. Remedy

Plaintiffs seek an injunction against Defendants to remove any part of the shore defense structures that lie below MHW, having waived damages. Such an injunction is available for both the trespass and the RHA violation. 33 U.S.C. § 406 (injunction available to remove structures erected in violation of Section 10 of the RHA).

Defendants urge that any injunction from this court be only for them to apply for after-the-fact permits for the shore defense structures. Despite having some flexibility in shaping the scope of relief, *United States v. Illinois Terminal R.R. Co.*, 501 F. Supp. 18, 21 (E.D. Mo. 1980) ("The federal courts have not limited enforcement of the River and Harbor Appropriation Act to the criminal and injunctive remedies provided in § 406. . . . Congress . . . has provided enough federal law in (33 U.S.C. § 403) from which appropriate remedies may be fashioned even though they rest on inferences."),[9] the court declines to issue such an injunction. First, such an injunction would not remedy the trespass. Second, regulations

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does not reduce navigable capacity of the filled waterway and thereby constitute an obstruction within the meaning of § 403 borders on the frivolous.").

[9] That flexibility is limited, however, to seeking only criminal penalties or some form of an injunction as "the Corps does not have the authority to compensate parties injured by . . . illegal activities." *Potomac River Ass'n, Inc. v. Lundeberg Maryland Seamanship School, Inc.*, 402 F. Supp. 344, 357 (D. Md. 1975).

authorizing such after-the-fact permits were rescinded by the Corps in 1977. 42 Fed. Reg. 37,122, 37,133 (July 19, 1977) (repealing 33 C.F.R. § 209.120, which included a provision, Section 209.120(c)(iv), for granting after-the-fact permits). Accordingly, if the court issues an injunction, it must be for the removal of the shore defense structures.

Under the RHA, to obtain an injunction, the government need not show irreparable injury and the court need not balance any interests. *United States v. Stoeco Homes Inc.*, 498 F.2d 597, 611 (3d Cir. 1974) ("No balancing of interest or need to show irreparable injury is required when an injunction is sought under § 12 to prevent erection or seek removal of an unlawful structure.") (dicta); *United States v. Ciampitti*, 583 F. Supp. 483, 498 (D.N.J. 1984) (citing *Stoeco Homes*); *United States v. Alleyne,* 454 F. Supp. 1164, 1170 (D.C.N.Y. 1978); *United States v. Underwood*, 344 F. Supp. 486, 494 (D.C. Fla. 1972). Consequently, the only remaining equitable considerations in issuing an injunction are (1) the nature of the interest to be protected, (2) any unreasonable delay in initiating the action, (3) any related misconduct on the government's part, and (4) the practicability of framing and enforcing the injunction. *Restatement (Second) Torts* § 936(1); *see also United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1301 (5th Cir. 1976) ("The degree and kind of wrong and the practicality of the remedy

must be considered in the formulation of that remedy.").[10]

In the present case, it is largely undisputed that the shore defense structures have negative environmental consequences. Johannessen Decl., Gov't Ex. 12 at 86:18-87:8 (negative effects of Defendants' shore defense structures include increased scouring of the beach in front of the structures, increased wave turbulence, a coarsening of the beach that tends to displace potential surf smelt spawning areas, and reducing sediment downdrift that nourishes beach habitats to the south of the structures). In light of the violation of the RHA, an injunction to remove the structures seaward of MHW is appropriate.[11] As the trespass claim is coextensive with the RHA claim, an injunction under Section 406 makes unnecessary a

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[10] The court finds that there was no unreasonable delay by the government. Nor has the government engaged in any related misconduct.

[11] In fashioning the remedy, the court finds *United States v. Sunset Cove, Inc.*, 514 F.2d 1089 (9th Cir. 1975), instructive. In that case, a developer constructed riprap below MHW in violation of 33 U.S.C. § 403 along a shoreline with an ambulatory boundary. The developer, much like the Defendants in the present case, installed the riprap to protect against erosion. The district court, having found a violation of Section 403, issued an injunction for the developer to remove *all* of the fill. In affirming the injunction, the Ninth Circuit modified it so that the defendants would only have to remove enough riprap to "permit nature, in a reasonable period of time, to take its course and approximately re-establish former topographic conditions." 514 F.2d at 1090.

remedy for the trespass claim given the government's waiver of all damages.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' motions for summary judgment [docket no. 224-1 & 231-1] are GRANTED. It is hereby adjudged and ORDERED that:

(1) Defendants shall promptly remove all rock, riprap, and other shore defense structures that are located seaward of MHW as that line is determined on the government's January 2002 survey. Such removal shall be supervised by the Chief of Engineers of the Army Corps of Engineers or his designee.

(2) As MHW moves up and down the shore, Defendants shall promptly, at the request of the government, remove all rock, riprap, and other shore defense structures that become located seaward of MHW, as that point is determined by subsequent surveys. Such removal shall be supervised by the Chief of Engineers of the Army Corps of Engineers or his designee.

(3) The government shall pay for any future survey establishing MHW for the purposes of this order. If such survey reveals that certain structures are located seaward of MHW, any defendant whose property is fronted by those structures shall jointly and severally compensate the United States for the cost of that survey.

(4) At anytime, the government can remove any structures located seaward of MHW and obtain joint and several compensation from the Defendants whose property is fronted by the offending structures.

DATED at Seattle, Washington this 16th day of June, 2003.

/s/ Barbara J. Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiffs, v. KEITH E. MILNER and SHIRLEY A. MILNER, et al., Defendants. THE LUMMI NATION, Intervenor-Plaintiff.	NO. C01-809R ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT RE: ARRESTING LANDWARD MOVEMENT OF BOUNDARY (Filed Feb. 11, 2003)

I. BACKGROUND

This case involves changes in the beach on Sandy Point in Whatcom County, Washington and the alleged trespass of shore defense structures onto land held by the United States in trust for the Lummi Nation. Defendants own properties that are bounded on one side by the sea. When property is bounded by water, that boundary is ambulatory, constantly changing location in response to erosion and accretion. *New Jersey v. New York*, 523 U.S. 767, 784 (1998). In the present case, the court has in fact already held that the seaward boundary of Defendants' properties, marked by mean high water, has always remained ambulatory. Order Granting United

States' and Lummi Nation's Motion for Partial Summary Judgment (Jan. 24, 2003); Order Denying Motion for Reconsideration (Feb. 6, 2003).

On January 30, 2003, this court heard argument from the parties on whether an artificial structure such as a seawall or bulkhead and riprap can "fix" the landward movement on the shore of an ambulatory boundary. For the purposes of this ruling, the court assumes that the bulkheads and riprap fronting Defendants' properties were initially placed *above* mean high water such that they were originally located wholly on Defendants' properties. Furthermore, the court assumes that erosion alone has caused the landward creep of the mean high-water mark so that it currently is located on the face of these structures.[1]

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[1] Were these assumed facts different, the matter would be easily resolved. For instance, it cannot be disputed that artificial structures placed *below* mean high water do not affect the location of the mark on the shore. *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 753 (1978) (when obstructions are placed below MHW, "the MHW line is to be fixed in accordance with its natural, unobstructed state"). It can also not be disputed that where authorized filling has occurred, the tidal boundary is marked at the face of the authorized fill. 91 A.L.R.2d 857 §2[b] (1963) (citing cases holding that expressly permitted or authorized reclamation and filling of adjacent shore creates title in the newly filled land in the riparian proprietor). The present facts assume that structures were originally placed above MHW and that MHW impacts those structures only as a result of erosion.

The court, having reviewed the pleadings filed by the parties and having heard oral argument, rules as follows.

II. DISCUSSION

A. Tidelands and the conflict of private rights

Tideland ownership is one of the more often contested issue [sic] in American property jurisprudence. Easily filled, tidelands are often encroached on by adjacent upland owners. Whether the upland owner fills the tidelands and claims them as his own, or whether he constructs piers, wharves, or other structures on or over them, in each case, the upland owner uses the land without the permission of the tideland owner.

Otherwise straightforward and simple trespass and purpresture actions are complicated by the fact that the boundary between tidelands and uplands is ambulatory. Such a boundary is constantly displaced according to the rules of erosion and accretion, which give title to accreted land to upland owners and title to eroded land to tideland owners. 3 *Washburn on Real Property* 65 (5th ed. 1887) ("the boundary-line of an owner's land bordering upon the sea varies with the gradual increase or diminution of quantity by the addition of alluvion, or by the wasting away before the action of the water in its encroachments upon the land, the line of the shore varying accordingly").

Dating back to Roman times,[2] the right established by these rules "rests in the law of nature . . . the same with that of the owner of a tree to its fruits and of the owner of flocks and herds to their natural increase." *County of St. Clair v. Lovingston*, 90 U.S. 46, 69 (1874). Its foundation is the maxim "*qui sentit onus debet sentire commodum*" – he who bears the burden of a thing ought also to experience the advantage arising from it. *Id.* In the present case, then, it is a natural right of both the Lummi Nation and the Defendants to have an ambulatory boundary.

At present, though, Defendants' ambulatory boundary is an unsatisfactory one. Much of the beachfront that had previously stood between winter storms and their homes has been washed away. Defendants seek to exercise their right to protect their property from the ravages of the sea, a right which they claim is as equally fundamental as Plaintiffs' right to an ambulatory boundary. *See, e.g., Chesapeake & Ohio Ry. Co. v. Harris Stanley Coal & Land Co.*, 56 F. Supp. 849, 851 (D.C. Ky. 1944) ("There is a fundamental rule of law that an individual has a right to use his property as he sees fit without interference from his neighbors."); *Jubilee Yacht Club v. Gulf Refining Co.*, 140 N.E. 280, 281

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[2] *See* J. Inst, Lib. II, Tit. I, § 20 ("the alluvial soil added by a river to your land becomes yours by the law of nations"). The rules of accretion can be found in the Napoleonic Code, the law of Spain, and English law. *See County of St. Clair v. Lovingston*, 90 U.S. 46, 66-67 & nn.32-39 (1874).

(Mass. 1923) ("The building of fences, walls or other structures, or making excavations on [one's] own land ordinarily is within the absolute right of the owner of a fee without reference to the incidental injury which may thereby be caused to his neighbor."). Defendants contend that, according to these cases, they are entitled to construct riprap and sea walls on their own property with the intent of protecting that property from an encroaching sea despite the consequences to Plaintiffs. 1 *Wood on Nuisances* 675, § 494 (3d ed.) ("Every proprietor of land exposed to the inroads of the sea may erect on his own land groins, or other reasonable defenses, for the protection of his land from the inroads of the sea, although by doing so, he may cause the sea to flow with greater violence against the land of his neighbor, and render it necessary for the latter to protect himself by the erection of similar sea defenses.").

Defendants' argument leads to unacceptable consequences in the present case. Here, Defendants' shore defense structures do not result merely in incidental injury. Rather these structures deny the United States and the Lummi Nation land that would otherwise accrue to them through erosion. As stated above, that land is a natural right which cannot be abrogated by the Defendants' need to maintain their own property. In purchasing property on the shore, Defendants accepted certain rules including gains through accretion and losses through erosion. Having played by those rules for many years, Defendants cannot now change those rules unilaterally in their

own favor without compensating the United States and Lummi Nation for their loss. By artificially stopping erosion that would otherwise occur, Defendants injure Plaintiffs, something that Defendants cannot do free of liability. *Turner v. Tuolumne County Water Co.*, 25 Cal. 397, 403 (Cal. 1864) ("While the defendant had an undoubted right to ward off from its own property the damaging effects of the storm, yet in exercising that right it was bound to take care not to injure that of the plaintiffs."); 1 *Wood on Nuisances* 675 ("But a man has no right to do more than is necessary for his defense and to make improvements at the expense of his neighbor."). Inasmuch as it is clear that Defendants are entitled to construct shore defense structures on their own property, "it is equally clear that this right to deal with the [sea] and to control its current must be exercised with a just regard to the rights of others." *Crawford v. Rambo*, 7 N.E. 429, 431 (Ohio 1886); *see also* 1 *Wood on Nuisances* § 350 ("While it is true that a riparian owner may erect bulwarks to protect his property from injury by the stream, yet they can only do this when it can be done without injury to others, either to an owner upon the opposite side of, or to those above or below him on the stream.").

This principle, that adjoining property owners cannot infringe on a neighbor's rights, is demonstrated in various similar contexts. For example, in

the apportionment of riparian rights,[3] one cannot increase one's rights at the expense of another. *Carr v. Kidd*, 540 S.E.2d 884, 891 (Va. 2001) (affirming rule that apportionment of riparian rights, which is based on the length of shore each riparian proprietor owns, is based on the natural shoreline regardless of any perimeter improvements). Likewise, a riparian owner cannot induce an artificial change in water boundaries if harm to other interests would occur. *Strom v. Sheldon*, 12 Wash. App. 66, 73 (1974). These cases all have in common the principle that a riparian owner cannot act in such a way as to cause an injury to a neighbor's rights. As in these cases, Defendants in the present case cannot abrogate their neighbors' right to an ambulatory boundary in favor of their own right to protect their property.[4]

In all, the court is persuaded that the mean high-water mark should be located at the point on the shore where it would be located but for the presence of Defendants' shore defense structures. If the mean high water mark were to be located on the shore defense structures, erosion would be effectively stopped and a very large benefit would accrue therein

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[3] Riparian rights include a riparian owner's right to erect structures up to the line of navigation.

[4] The court considers this obligation to avoid injury to be reciprocal. Inasmuch as Defendants must not act in a way to infringe Plaintiffs' right to an ambulatory boundary, Plaintiffs cannot be unreasonable in the exercise of their rights to the detriment of Defendants' rights.

to Defendants at the detriment of the United States and the Lummi Nation. Accordingly, the court holds that artificial structures that are not otherwise authorized do not arrest the landward movement of an ambulatory water boundary.

III. CONCLUSION

For the foregoing reasons, Defendants' motion for partial summary judgment [docket no. 161-1] is DENIED. The court holds that the tideland boundary is marked by the intersection of mean high water and the shore as it would be located but for the presence of artificial structures.

DATED at Seattle, Washington this 11th day of February, 2003.

/s/ Barbara J. Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, v. KEITH E. MILNER and SHIRLEY A. MILNER, et al., Defendants.	NO. C01-809 ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION (Filed Jan. 13, 2003)
THE LUMMI NATION, Intervenor-Plaintiff.	

Before the court is Defendants' motion for clarification and reconsideration of this court's November 26, 2002 order, granting in part and denying in part Plaintiffs' motion to exclude testimony, limit discovery, and strike defenses. Specifically, Defendants ask the court to reconsider the relevance of the testimony of Defendants' expert, Jeffrey Layton, and if not, to at least clarify the scope to which Layton's testimony is excluded.

Under Local Rule 7(h), motions for reconsideration are disfavored and are ordinarily denied unless the moving party demonstrates "manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to [the

court's] attention earlier with reasonable diligence." LR 7(h). In the present motion, Defendants contend that the court committed error when it relied on an incomplete description of the applicable law of trespass in ruling that Layton's testimony was irrelevant to the trespass action. Defendants also suggest the court erred in relying on Washington law whereas federal law controls an action for trespass on Indian lands.

The parties have not briefed, and the court has not found, a substantive difference between federal and state law trespass. *Compare Kaech v. Lewis County Pub. Util. Dist. No. 1*, 106 Wash. App. 260, 281 (2001) (adopting Restatement), *with U.S. v. West*, 232 F.2d 694, 699 (9th Cir. 1956) (adopting Restatement). Both bodies of law rely heavily on the Restatement. Consequently, any error by the court in relying on Washington law is harmless at best.

Furthermore, the definition of trespass upon which the court relied was sufficiently complete to support the conclusion that Layton's testimony is not relevant.[1] Layton's testimony, as embodied in his report, answers the question of "[w]hat is the underlying cause (or causes) of the degradation of the beach berm that fronts the defendants' property?" Attach. 1, Johnson Decl. at 9 (Oct. 30, 2002). While it is true

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[1] The court defined trespass as occurring when a person "intentionally . . . remains on the land . . . or fails to remove from the land a thing which he is under a duty to remove."

that whether these changes are the result of erosion or avulsion is possibly relevant to this action, Layton's testimony expresses no opinion on the character of the changes. Layton Dep. at 116-17. Furthermore, contrary to Defendants' reading of *Georgia v. South Carolina*, 497 U.S. 376 (1990), the determinative set of facts in determining whether shoreline changes are avulsive or erosive is the rapidity of the changes and not whether they are man-made or natural. 497 U.S. at 403 ("The rapidity of some aspects of the dredging and other processes led the Special Master to conclude that the changes in the Savannah River were primarily avulsive in nature."). Layton's testimony does not address these issues and is therefore irrelevant.

Likewise, the definition employed by the court incorporated the concept cited by Defendants that they would not be liable if they are under no duty to remove the allegedly trespassing structures. Layton's testimony, however, does not address Defendants' duties. Inasmuch as the parties dispute whether Defendants have a duty to remove the shore defense structures, Layton's testimony only points to the fact that Defendants themselves have not caused the beachfront changes – a fact that is not disputed. Layton's testimony, therefore, contributes nothing to a determination of whether Defendants have any duty.

However, inasmuch as the court's prior order was unclear as to the scope to which Layton's testimony is

excluded, the court will clarify: Layton's report, attached to the October 10, 2002 Johnson Declaration, is excluded solely as it bears on the question of what has caused the beachfront changes on Sandy Point. Layton may still testify on other matters that establish the timing of the changes in the shoreline, the nature of the changes, and on other matters that are relevant.

DATED at Seattle, Washington this 10th day of January, 2002.

/s/ Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, v. KEITH E. MILNER and SHIRLEY A. MILNER, et al., Defendants.	NO. C01-809R ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO EXCLUDE TESTIMONY, LIMIT DISCOVERY, AND STRIKE DEFENSES (Filed Nov. 26, 2002)
THE LUMMI NATION, Intervenor-Plaintiff.	

THIS MATTER comes before the court on the United States' and Lummi Nation's motion to exclude testimony, limit discovery, and strike affirmative defenses. Having reviewed the papers filed in support of and in opposition to this motion, the court finds and rules as follows:

I. BACKGROUND

This case is about rockeries and bulkheads that are alleged to trespass onto tidelands on Sandy Point, Washington to which the United States claims it

holds title in trust for the Lummi Indian Nation.[1] In answering the complaints, Defendants Keith E. and Shirley A. Milner, Mary D. Sharp, Brent C. and Mary K. Nicholson, Harry F. Case, Ian C. and Marcia A. Boyd, and Donald C. and Gloria Walker (hereinafter "the Milners") collectively raise an affirmative defense denying that either the United States or Lummi Nation hold title to the property in dispute. As part of their defense, the Milners plan to offer the testimony of Jeffrey Layton, whose proposed testimony is that the changes in the tide lines fronting the Milners' properties have been caused by the construction of two deep-water piers to the north of the Milners' properties. The Milners have also propounded discovery seeking documents from the United States and Lummi Nation related to the construction, improvement, or maintenance of the two deep-water piers.

In response, the United States and Lummi Nation have moved the court to strike the Milners' affirmative defense, exclude Layton's testimony, and relieve them from the responsibility of responding to the Milners' discovery requests.

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[1] In addition to trespass, the complaints also allege violations of Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 and Section 301 of the Clean Water Act, 33 U.S.C. § 1311(a).

II. DISCUSSION

A. Motion to strike affirmative defense

Under FRCP Rule 12(f), a court acting on its own initiative may strike an insufficient defense at any time. *U.S. v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1535 (E.D. Cal. 1992) (citing 5A C. Wright and A. Miller, *Federal Practice and Procedure* § 13080 (2d ed. 1990)). The court will consider Plaintiffs' motion even though the motion is untimely.[2] *Id.* Such a motion to strike is granted only if the affirmative defense is insufficient as a matter of law. *Id.* (citing *Memorex Corp. v. Int'l Bus. Mach. Corp*, 555 F.2d 1379 (9th Cir. 1977)).

1. Tidelands are held in trust

Plaintiffs argue that they maintain title to the tidelands in question. By treaty and executive order in 1855 and 1873, the United States reserved to the Lummi Nation land on Sandy Point to the low-water mark. Treaty of Point Elliott, 12 Stat. 927 (Jan. 22, 1855); Executive Order (Nov. 22, 1873), *reprinted in* 1 Kappler, *Laws and Treaties* 917 (Gov't Printing Office 1904). Under the doctrine first announced in *Pollard's Lessee v. Hunter*, 44 U.S. 212 (1845), such an express reservation precludes title in the tidelands in any other entity. *Shively v. Bowlby*, 152 U.S. 1, 58 (1894) (states take title to submerged and tidal lands upon

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[2] A motion to strike must be filed within 20 days of the service of an answer.

statehood subject to any express reservation by the United States or any prior grant of those lands). As Washington gained statehood in 1889, the land down to the low-water mark is held in trust by the United States on behalf of the Lummi Nation. *Id.*

2. Dispute of fact regarding boundaries

The Milners succeed to properties that were patented from the Lummi Reservation. These properties are bounded by the beach. The land along the beach, however, has not remained static. In the present case, a substantial amount of beachfront fronting the Milners' properties has been lost since 1962.[3] Through erosion, accretion, and avulsion,[4] the low- and high-water marks have changed over time. If the change is slow and imperceptible, as by erosion or accretion, the boundary lines shift. *Parker v. Farrell*, 74 Wash. 2d 553, 554-55 (1968). If, on the other hand, the change is avulsive, the original boundary lines remain. *Id.* at 555.

Plaintiffs contend that the change in the shoreline is due to erosion and that the property lines have accordingly shifted landward, leaving the Milners' rockeries and bulkheads on Lummi land. The Milners, on the other hand, allege that the

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[3] For example, on the Walker lot, the mean high water mark has moved landward 92 feet. Ex. 1, Stephens Decl. at 5.

[4] Avulsion is the sudden and rapid change in a shoreline. *Parker v. Farrell*, 74 Wash. 2d 553, 555 n.1 (1968).

changes were avulsive and that property lines have not changed so that the rockeries and bulkheads are still located on their land.

Without further proof of the nature of the change in the shoreline fronting the Milners' properties, it cannot be determined as a matter of law whether the rockeries and bulkheads are located on the Milners' property. This dispute of fact makes striking the affirmative defense inappropriate.

B. Motion to exclude Layton's testimony

Under FRE 401, only relevant evidence is admissible. Under that rule, relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

In the present case, the moving parties have sued for trespass. Under Washington law, a person trespasses "when he or she 'intentionally . . . remains on the land or . . . fails to remove from the land a thing which he is under a duty to remove.'" *Kaech v. Lewis County Pub. Util. Dist. No. 1*, 106 Wash. App. 260, 281 (quoting *Bradley v. Am. Smelting & Refining Co.*, 104 Wash. 2d 677, 681-82 (1985)). Consequently, Layton's testimony about the cause of the loss of beachfront that allegedly resulted in the Milners' structures being outside their property lines is irrelevant as it does not establish whether the Milners' are in fact trespassing. Moreover, the cause of the

beachfront loss is also irrelevant to a determination of whether that loss resulted from erosion or an avulsion as the determining factors are the speed and rapidity of the change, not whether the change was manmade or natural. *Compare In re Point Lookout*, 144 N.Y.S.2d 440 (1954) (loss of 30 feet of beach due to seawall is avulsive), *with, City of New York v. Realty Assoc.*, 256 N.Y. 217 (1931) (storms washing away beach are avulsive). Nor is the cause of the beachfront loss relevant to the amount of damages arising *from the trespass*. Simply put, evidence about the cause of the erosion has no tendency to make any fact that is of consequence to the determination of the action more or less likely.

At this stage, Defendants' have failed to demonstrate the relevance of Layton's testimony. Accordingly, the testimony is excluded. Should the testimony become relevant at some future point, Defendants' can seek the court's permission to admit the testimony.

C. Motion to limit discovery

FRCP Rule 26(c) allows a party to move for a protective order that discovery not be had where justice requires that the party be protected from "annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c). Though not styled as such, the court interprets the moving parties' motion to limit discovery as a motion for a protective order.

Having reviewed the declaration of Brian Kipnis, the court finds that the parties have not adequately conferred as required by FRCP 26(c). The court, therefore, orders that the parties meet and confer to determine whether production of the administrative record accompanying any permitting decisions for the two piers is sufficient or whether the parties can agree on other limitations that will resolve this dispute.

III. CONCLUSION

For the foregoing reasons, the United States' and Lummi Nation's motion [docket no. 92-1] is GRANTED in part and DENIED in part. It is hereby ORDERED that

1. Jeffrey Layton's proposed testimony be excluded;
2. the parties should meet and confer regarding the Milners' requests for production number 3 and 4 in Defendants' second set of requests for production; and
3. the parties should contact Elizabeth Tyree at (206) 553-2996 to set a status conference regarding possibly bifurcating the case to handle the boundary dispute separate from any issue of damages.

DATED at Seattle, Washington this 26th day of November, 2002.

/s/ Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, v. KEITH E. MILNER and SHIRLEY A. MILNER, et al., Defendants. THE LUMMI NATION, Intervenor-Plaintiff.	NO. C01-809R ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND STRIKING AS MOOT LUMMI NATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT (Filed Dec. 19, 2002)

THIS MATTER comes before the court on Defendants' motion for summary judgment and on Plaintiff in Intervention Lummi Nation's motion for partial summary judgment. Having reviewed the papers filed in support of and in opposition to these motions, the court finds and rules as follows:

I. BACKGROUND

The facts of this case were recently set forth in the court's December 16, 2002 order. Before the court is a motion for summary judgment by defendants Keith E. and Shirley A. Milner, Mary D. Sharp, Brent C. and Mary K. Nicholson, Ian C. and Marcia A.

Boyd, and Donald C. and Gloria Walker (hereinafter, collectively as the "Defendants").[1] Additionally, before the court is a motion for partial summary judgment by the Lummi Nation on the laches, estoppel, waiver, and non-ownership defenses raised by all the defendants in the case.

II. DISCUSSION

A. Lummi Nation's motion

The Lummi Nation has moved for partial summary judgment as to the defenses to trespass raised by Defendants including laches, estoppel, waiver, and non-ownership. The court ruled on the non-ownership defense in its order dated December 16, 2002. Laches, estoppel, and waiver are not applicable in a suit by the United States seeking to vindicate the Lummi Nation's rights. *Bd. of Comm'rs v. U.S.*, 308 U.S. 343, 350-51 (1939); *U.S. v. Washington*, 157 F.3d 630, 649 (9th Cir. 1998) (affirming district court's rejection of equitable defenses where tribe asserted rights 135 years after entering into a treaty); *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983) ("laches or estoppel is not available to defeat Indian treaty rights"). But since Defendants have withdrawn these defenses, the Lummi Nation's motion is stricken as moot.

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[1] Defendant Harry F. Case did not join in this motion.

B. Defendants' motion

Defendants have moved for summary judgment on all of the government's claims. In addition to the defense of non-ownership, Defendants raise the defenses to the trespass claim that they have the right to encroach on the tidelands and that the government cannot establish the intent and causation elements of trespass. As to the regulatory violations, Defendants claim that their actions are lawful under nationwide permits and that the government has no jurisdiction.

1. Right to encroach

Defendants contend that regardless of ownership, they have a right to "wharf out" that entitles them to maintain the shore defense structures on the tidelands. It is well settled that a riparian owner has a right of *access* from the front of his land to the navigable part of a stream, such that when not forbidden by public law, he may construct landings, wharves, or piers for the purpose of enhancing access. *U.S. v. River Rouge Improvement Co.,* 269 U.S. 411, 418 (1926).

Defendants fail to cite any case law that extends this right to "wharf out" to the construction of bulkheads and riprap. In fact, courts have held the exact opposite – that the construction of such structures is *not* within this right. *See, e.g., U.S. v. 62.61 Acres of Land,* 547 F.2d 818, 820 (4th Cir. 1977) (a stone jetty used solely for stream navigation and current deflection is not within the right to "wharf out");

Confederated Salish and Kootenai Tribes v. Namen, 380 F. Supp. 452, 467 (D.C. Mont. 1974) (finding a dispute of fact whether a building and landfill extending into a lake exceed the limits of the right to wharf out).

2. Intent and causation for trespass

Defendants contend that they cannot be liable for trespass because they never intended to trespass. Under the Restatement of Torts,[2] a person trespasses when he "intentionally . . . remains on the land or . . . fails to remove from the land a thing which he is under a duty to remove." RESTATEMENT (SECOND) OF TORTS § 158; *see also Kaech v. Lewis County Pub. Util. Dist. No. 1*, 106 Wash. App. 260, 281 (quoting *Bradley v. Am. Smelting & Refining Co.*, 104 Wash. 2d 677, 681-82 (1985)). "In the case of trespass through the continuing presence of chattels on another's land, the requisite intent does not arise until the duty to remove the chattels arises, which does not occur until a demand for removal has been made." *New York State Energy Research and Dev. Auth. v. Nuclear Fuel*

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[2] Inasmuch as there is a federal common law trespass cause of action to protect Indian lands, *see U.S. v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1550 n.8 (9th Cir. 1994), federal common law seems to abide by the Restatement. *See U.S. v. West*, 232 F.2d 694, 699 (9th Cir. 1956) (adopting Restatement (First) of Torts for operative definition of federal trespass); *U.S. v. Osterlund*, 505 F. Supp. 165, 167 (D.C. Colo. 1981) (adopting Restatement (Second) of Torts).

Services, Inc., 561 F. Supp. 954, 974 (W.D.N.Y. 1983) (citing RESTATEMENT (SECOND) TORTS §§ 158, 160).

Given that the government has made a demand to remove the shore defense structures, Defendants would have the requisite intent if the structures are on the government's land. As there is a dispute of fact as to whether that is the case, it is impossible to state at this juncture whether Defendants do or do not have the intent to trespass.

Defendants also contend that since it was the shifting beach that has caused the shore defense structures to be located on the tidelands, they cannot be liable for trespass. Defendants liken their situation to one raised in an illustration to the Restatement: if a tornado picks up and drops a house onto someone else's land, the owner of the house is not liable for trespass. RESTATEMENT (SECOND) TORTS § 158, ill. 1.

Defendants have not sat idly while the shifting beach caused a trespass. Rather, they have continually augmented the riprap and bulkheads. Given the shifting boundary, it is possible that Defendants deposited rock on the tidelands causing a trespass. Because there is a question of fact as to the location of the boundary lines at all relevant times when Defendants augmented the bulkheads and riprap, there is a question of fact as to whether Defendants have caused a trespass. Summary judgment is therefore not appropriate.

C. Regulatory violations

1. Nationwide permits

Defendants contend that at all times their actions in supplementing the shore defense structures were authorized by two nationwide permits,[3] one for the repair, rehabilitation, or replacement of previously authorized, currently serviceable structures, and one for bank stabilization. 33 C.F.R. § 330.5(a)(3), (a)(13) (1982).

As a prerequisite for a nationwide permit, all applicable relevant conditions must be met. 33 C.F.R. § 330.1. Defendants fail to demonstrate that they have complied with all of the relevant conditions. One condition is that heavy equipment working on the tidelands should be placed on mats. 33 C.F.R. § 330.6(a)(6). In the present case, at least one defendant used such heavy equipment without mats to return rocks that had slipped seaward from the riprap. The court finds that there is a genuine dispute of fact as to whether Defendants have complied with the applicable relevant conditions and therefore, whether the nationwide permits apply.

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[3] A nationwide permit is a general permit issued by the Chief of Engineers of the Army Corps of Engineers to satisfy the requirements of both Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. 33 C.F.R. § 330.1 (1982). Since 1982, the year that marks the beginning of Defendants' actions, the nationwide permits at issue in the present case have only changed slightly in ways that do not affect this case.

2. Federal jurisdiction

Defendants contend that all of their actions were conducted outside federal jurisdiction. Federal regulatory jurisdiction under the Rivers and Harbors Act ("RHA") extends seaward from MHW. Under the Clean Water Act ("CWA"), federal regulatory jurisdiction extends landward up to mean higher high water ("MHHW").

a. Rivers and Harbors Act

Under the RHA, the United States has extensive authority to seek an injunction to remove obstructions that may have been legally constructed. *United States v. Alameda Gateway, Ltd.*, 213 F.3d 1161, 1167 (9th Cir. 2000); *see also United States v. Alameda Gateway, Ltd.*, 953 F. Supp. 1106, 1111 (N.D. Cal. 1996) ("deem[ing] the RHA inapplicable to pre-existing structures would sharply restrict the ability of the government to preserve the public interest in maintaining unimpeded access to the navigable waters of the United States.").

In the present case, it is undisputed that at the time of the government's last survey, rock and riprap extend seaward beyond the MHW line. Stephens Decl. ¶ 8. It is irrelevant whether the riprap was originally placed above MHW for the purposes of the government's RHA claim. The presence of these obstructions below MHW at this time is sufficient to trigger federal jurisdiction.

b. Clean Water Act

In its complaint, the United States alleges that Defendants violated section 404 of the CWA by "placing or allowing fill material to be placed in waters of the United States." Compl. ¶ 18. The United States also alleges that the Defendants are in violation of Section 301, which prohibits the discharge of a pollutant without a permit. Compl. ¶ 19. Defendants respond that because all of the shore defense structures were originally placed above MHHW, there can be no CWA violation.

It is undisputed that rock and riprap currently extend seaward beyond MHHW. Stephens Decl. ¶ 8. In fact, rocks from the riprap continually fall seaward, sometimes coming to rest well beyond MHHW. Bennett Decl. ¶ 8 ("When rocks from our property had moved down to the beach, we would move them back."). Whether the fill material composing the bulkhead and riprap runs off and disperses into the water is disputed by the parties, making resolution of the alleged CWA violations inappropriate for summary judgment.

Lastly, Defendants contend that they did not violate section 404 given the exemption in the CWA for "maintenance . . . of currently serviceable structures such as . . . riprap." 33 U.S.C. § 1344(f)(1)(B). Whether Defendants' additions and expansion of the original shore defense structures qualify as maintenance is a question of fact inappropriate for resolution on summary judgment.

III. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment [docket no. 95-1] is DENIED. The Lummi Nation's motion for partial summary judgment [docket no. 108-1] is STRICKEN.

DATED at Seattle, Washington this 19th day of December, 2002.

/s/ Barbara J. Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, v. KEITH E. MILNER and SHIRLEY A. MILNER, et al., Defendants.	NO. C01-809R ORDER GRANTING UNITED STATES' AND HARRY F. CASES'S [sic] MOTIONS FOR PARTIAL SUMMARY JUDGMENT (Filed Dec. 16, 2002)
THE LUMMI NATION, Intervenor-Plaintiff.	

THIS MATTER comes before the court on the United States' and Harry F. Case's motions for partial summary judgment. Having reviewed the papers filed in support of and in opposition to these motions, the court finds and rules as follows:

I. BACKGROUND

The defendants in this case, Keith E. and Shirley A. Milner, Mary D. Sharp, Brent C. and Mary K. Nicholson, Harry F. Case, Ian C. and Marcia A. Boyd, and Donald C. and Gloria Walker (hereinafter, collectively as the "Defendants") own property on Sandy

Point in Whatcom County, Washington, along the Gulf of Georgia. Each of these properties is protected by shore defense structures, including bulkheads fronted by riprap.[1] In 1982, a major storm caused severe erosion of the beach. Since then, defendants Sharp, Nicholson, Bennett, and Walker have supplemented their shore defense structures.

In its complaint, the United States alleges that these shore defense structures trespass onto tidelands on Sandy Point to which the United States claims title for the Lummi Nation. In addition to trespass, the complaint also alleges violations of Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (placing an obstruction in a navigable water), and Section 301 of the Clean Water Act, 33 U.S.C. § 1311(a) (discharging of dredged and fill material or pollution without a permit).

Before the court are two motions filed by the parties. The United States has moved for partial summary judgment on the issue of ownership of the tidelands. Defendant Harry E. Case has moved for partial summary judgment on the issue of whether the tide-lands extend to mean high water or to the line of vegetation. The court will consider each motion in turn.

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[1] Riprap is a collection of large rocks seaward of the bulkheads.

II. DISCUSSION

In 1855, the Point Elliot Treaty created the Lummi Indian Reservation. Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927. In 1873, pursuant to the authority vested in him by the treaty, President Grant reserved land on Sandy Point to the low-water mark on behalf of the Lummi Nation. Executive Order (Nov. 22, 1873), *reprinted in* 1 Kappler, *Laws and Treaties* 917 (Gov't Printing Office 1904). According to the treaty, this land could be surveyed into lots and patented by members of the tribe. Treaty of Point Elliot at art. 7. In 1873 and 1883, the land in the reservation was surveyed and divided into lots. In 1906, Henry Finkbonner received a patent to Lot 1 of Section 16 in Township 38 North, Range 1 East. In 1907, Frank Finkbonner received a patent to Lot 1 in Section 17, Township 38 North, Range 1 East. These lots were subsequently purchased and subdivided. Defendants are successors in interest to parcels derived from these original patents.

A. Tideland ownership

The United States has moved for partial summary judgment on the issue of tideland ownership. The government argues that it has title to the tidelands in question. Defendants counter that title to the tidelands passed to the state of Washington upon statehood.

Longstanding precedent in the Ninth Circuit has held that the tidelands in the Lummi Reservation are

held by the United States on behalf of the Lummi Nation. For instance, in *United States v. Stotts*, 49 F.2d 619 (W.D. Wash. 1930), the district court quieted title in the tidelands on the Lummi Reservation in favor of the United States. 49 F.2d at 620-21. In *Stotts*, the state of Washington sold off tidelands in the Lummi Reservation. When the United States sued to quiet title in those properties, the court held that the United States had acted in accordance with the interests of the Indians and made a reservation of the tidelands such that title was held in the United States in trust for the Lummi Nation. *Id.*; *see also United States v. Romaine*, 255 F. 253, 259 (9th Cir. 1919) (title to tidelands on the Lummi Reservation in the United States).

Defendants contend, however, that this precedent is flawed because the prior decisions did not consider whether President Grant's reservation was sufficient to defeat the principle that title to submerged lands passes to a state upon entry into the Union. *See Pollard's Lessee v. Hunter*, 44 U.S. 212 (1845) (under "equal footing" doctrine, new states admitted to the Union succeed to the United States' title to submerged lands). Defendants fail, however, to persuade this court that such longstanding precedent and expectations should now be overturned.

First, "[o]nce a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court." *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). The doctrine of *stare*

decisis applies with special force to decisions that affect title to land. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 381 (1977); *Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Namen*, 665 F.2d 951, 960 (9th Cir. 1982). As the Supreme Court has stated, "Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open." *Minnesota Mining Co. v. Nat'l Mining Co.*, 70 U.S. 332, 334 (1865).

Next, the prior decisions are correct under the doctrine that an executive reservation of submerged lands defeats a future state's title if the reservation "clearly includes submerged lands, and Congress recognizes the reservation in a way that demonstrates an intent to defeat state title." *Idaho v. U.S.*, 533 U.S. 262, 273 (2001) (citing *U.S. v. Alaska*, 521 U.S. 1, 41-46, 55-61 (1997). In the present case, the 1873 Executive Order clearly reserves the land along the shores of Sandy Point down to the low-water mark.[2] Under the treaty, that reservation served to

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[2] In relevant part, the Order states:

> It is hereby ordered that the following tract of country in Washington Territory be withdrawn from sale and set apart for the use and occupation of the Dwamish and other allied tribes of Indians . . . thence west along said township line to the *low-water mark* on the shore of the Gulf of Georgia.

Executive Order (Nov. 22, 1873), *reprinted in* 1 Kappler, *Laws and Treaties* 917 (Gov't Printing Office 1904) (emphasis added).

provide subsistence to the Lummi. *Stotts*, 49 F.2d at 620-21 (taking judicial notice that the Lummi subsisted on hunting and fishing and that "the tidelands were a necessary perquisite to the enjoyment of fishing"). Furthermore, Congress was aware of the extent of that reservation. *See* Report of the Secretary of the Interior, Exec. Doc. 1, Pt. 5, 46th Cong., 2d Sess. at 264 (1879) (map displaying reservation boundary and citing the 1873 executive order). The court concludes that since Congress did not rescind the reservation of the tidelands despite this notice, Congress intended to defeat state title. *Idaho v. U.S.*, 533 U.S. 262, 274 (2001) (it is sufficient for Congress to be on notice that a reservation includes submerged lands and that the purpose of the reservation would be compromised if the submerged lands passed to the state).

In sum, then, Defendants do not provide any reason for this court to upset over 70 years of precedent. The government's motion is GRANTED.

B. Tideland boundary

Harry F. Case has moved for partial summary judgment as to the landward boundary of the tidelands. Case contends that that boundary is mean high water ("MHW") and not the line of vegetation as

claimed by the Lummi Nation.[3] Mean high water or mean high tide is the average elevation of all tides as observed at a location through a complete tidal cycle of 18.6 years. *Borax Consol., Ltd. v. City of Los Angeles*, 296 U.S. 10, 26-27 (1935).

A question "as to the extent of [a] federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question." *Borax*, 296 U.S. at 22; *see also Wilson v. Howard*, 5 Wash. App. 169, 180 (1971) (applying federal law to determine high-water mark and boundary of federally patented land). In *United States v. Boynton*, 53 F.2d 297, 298 (9th Cir. 1931), the Ninth Circuit held that the seaward boundary of the lots patented by Lummi tribal members was the high-tide line as then located. 53 F.2d at 298. The "general rule . . . is that patents of the United States to lands bordering [tidelands], in the absence of special circumstances, convey only to the high water mark." *Montana Power Co. v. Rochester*, 127 F.2d 189, 192 (9th Cir. 1942). In light of *Boynton*, therefore, the seaward boundary of the present properties is the high-water mark. *Boynton*, 53 F.2d at 298.

Furthermore, in the case of tidal waters, "the high-water mark means the line of high water

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[3] In its Complaint in Intervention, the Lummi Nation defines the tidelands in question as all lands between the low-water mark and the line of vegetation. Lummi Compl. ¶ 13.

determined by the course of the tides, not as determined by physical markings made upon the ground by the water."[4] *U.S. v. Washington*, 294 F.2d 830, 834 (9th Cir. 1961). Since the properties in question were patented under federal law, it is irrelevant that the state of Washington defines the high-water mark as the line of vegetation. *Borax*, 296 U.S. at 22; *see Harkins v. Del Pozzi*, 50 Wash. 2d 237, 240 (1957) ("The line of ordinary high tide is that line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of vegetation and destroy its value for agricultural purposes."). Consequently, the seaward boundary of the patented properties (and conversely the landward boundary of the tidelands) is mean high water. Defendant Harry F. Case's motion is GRANTED.

III. CONCLUSION

For the foregoing reasons, the United States' motion [docket no. 117-1] and Harry F. Case's motion [docket no. 90-1] are GRANTED.

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[4] In contrast, the line of vegetation is used to mark high water only on rivers, streams, and other nontidal waters that have "no absolute ascertainable level because of variations of flow from a multitude of causes." *U.S. v. Washington*, 294 F.2d 830, 834 (9th Cir. 1961).

DATED at Seattle, Washington this 16th day of December, 2002.

/s/ Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, v. KIETH [sic] E. MILNER and SHIRLEY A. MILNER, et al., Defendants.	NO. C01-809R ORDER DENYING DEFENDANT MILNER'S MOTION FOR SUMMARY JUDGMENT
THE LUMMI NATION, Intervenor-Plaintiff.	

THIS MATTER comes before the court on Defendants' motion for partial summary judgment. Having reviewed the papers filed in support of and in opposition to this motion, the court finds and rules as follows:

I. BACKGROUND

In 1999, Keith and Shirley Milner purchased property on Sandy Point Peninsula on the Lummi Indian Reservation. Shore defense structures, including a bulkhead and riprap, project from the westerly portion of the Milners' property and extend seaward. It is undisputed that the structures existed

prior to the Milners' purchase, and that the Milners have not placed, or authorized anyone else to place, materials on the bulkhead and riprap since.

The United States filed a civil action against the Milners under the Rivers and Harbors Act ("RHA"), the Clean Water Act ("CWA"), and for trespass seeking a permanent injunction ordering the Milners to remove the structures as well as civil penalties. The Milners have filed for partial summary judgment on the basis that they cannot be liable under the RHA and CWA because they did not construct the shore defense structures.

II. DISCUSSION

A. Rivers and Harbors Act of 1899

Section 10 of the Rivers and Harbors Act ("RHA") makes it unlawful "to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in . . . [a] water of the United States" unless authorized by the Army Corps of Engineers. 33 U.S.C. § 403. Section 10 is enforced through Section 12, which provides for criminal penalties. 33 U.S.C. § 406. Section 12 also provides for "the removal of any structures or parts of structures erected in violation of [Section 10] . . by the injunction of any district court exercising jurisdiction in any district in which such structures may exist." *Id.*

In the present case, the United States is seeking such an injunction ordering the Milners to remove the bulkhead and riprap. The Milners respond that they cannot be enjoined to do so because they did not erect the offending bulkhead and riprap and, therefore, never violated Section 10. Defendants' argument, however, is unpersuasive.

Under the RHA, the United States has extensive authority to seek an injunction to remove obstructions. The RHA was enacted to preserve and protect the country's navigable waterways and the Act must be read broadly, with full consideration of the public purposes to be served. *United States v. Republic Steel,* 362 U.S. 482, 491 (1960) ("We read the 1899 Act charitably in light of the purpose to be served."). In *United States v. Alameda Gateway, Ltd.,* 213 F.3d 1161 (9th Cir. 2000), the Army Corps of Engineers sued the current owners of a pier to recover costs associated with the removal of portions of two piers. The piers had been lawfully constructed by an earlier owner. The Corps sought to have portions of the piers removed because a change in the harbor line caused the piers to be obstructions. The Ninth Circuit held that the Corps could recover against the defendants, even though the defendants did not construct the piers. *Alameda Gateway,* 213 F.3d at 1167; *see also United States v. Alameda Gateway, Ltd.,* 953 F. Supp. 1106, 1111 (N.D. Cal. 1996) ("*Gateway I*") ("deem[ing] the RHA inapplicable to pre-existing structures would sharply restrict the ability of the government to preserve the public interest in

maintaining unimpeded access to the navigable waters of the United States.").

Defendants' attempts to distinguish *Alameda Gateway* are unavailing.[1] Defendants' attempts to introduce intent as a requisite element in the government's cause of action are likewise unavailing.[2] In light of the holding in Alameda Gateway, this court holds that, under the RHA, Defendants can be ordered to remove the bulkhead and riprap. Accordingly, Defendants' motion for summary judgment is denied.

B. Clean Water Act

Section 301 of the Clean Water Act ("CWA") makes unlawful "the discharge of any pollutant by any person" without a permit. 33 U.S.C. § 1311.

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[1] The Milners attempt to distinguish *Alameda Gateway* by pointing out 1) that in *Alameda Gateway*, the government was seeking reimbursement for the removal of the obstruction; 2) that in *Alameda Gateway*, defendant was a commercial enterprise whereas the Milners are private citizens; and 3) that in *Alameda Gateway*, the piers became obstructions as a result of congressionally mandated harbor improvements whereas in the present case, no such congressional action has occurred. Defs.' Repy at 7-8.

[2] For instance, Defendants cite *U.S. v. Ohio Barge Lines, Inc.*, 607 F.2d 624 (3d Cir. 1979) and *United States v. Bigan*, 274 F.2d 729 (3d Cir. 1960) for the proposition that Section 12 requires some intent and active contribution to the erection of the obstruction. These cases, however, are distinguishable and are unpersuasive in light of the recent Ninth Circuit decision in *Alameda Gateway*.

Under Section 404 of the CWA, the Army Corps of Engineers can issue permits for the discharge of dredge and fill material. 33 U.S.C. § 1344. Under Section 402, the Administrator of the EPA can issue permits for the discharge of any other pollutant. In its complaint, the United States alleges that the Milners violated section 404 by "placing or allowing fill material to be placed in waters of the United States." Compl. ¶ 18. The United States also alleges that the Defendants are in violation of Section 301. Compl. ¶ 19. The Milners argue, however, that they cannot be liable under the CWA because they never placed any of the fill materials in question. The Milners are partially correct.

Section 404 prohibits the discharge of dredge and fill material without a permit. In *Froebel v. Meyer,* 217 F.3d 928 (7th Cir. 2000), the court held that a Section 404 permit "is required only when the party allegedly needing a permit takes some action, rather than doing nothing whatsoever." 217 F.3d at 938. In *Froebel,* plaintiff sued Waukesha County, which owned land on which a breached dam was located. The breach, created by the state of Wisconsin and not by Waukesha County, caused the deposit of sediment downstream from the breach. In dismissing Froebel's claim against the County, the court held that "Section 404, its underlying regulations, and cases applying its terms all have a common element . . . [of] active conduct that results in the discharge of dredged or fill material." *Id.* at 939. In *Froebel,* the lack of any action by the County to discharge dredged or fill

material proved fatal to a Section 404 cause of action. Consequently, the Milners cannot be held liable under Section 404 given the undisputed evidence that they never placed any fill material into a water of the United States.[3]

However, in the instant case, there is a dispute as to whether the fill material composing the bulkhead and riprap remain inert or whether the material runs off and disperses into adjacent water. If such run off or dispersion occurs, then the Milners may be liable for violation of Section 301 by allowing a discharge of a pollutant without an appropriate permit. Whether such runoff and/or dispersion is occurring cannot be determined on the record before the court. Accordingly, summary judgment must be denied.

III. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment [docket no. 78-1] is DENIED.

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[3] Cases cited by the government for the proposition that one is liable for the continuing presence of dredged or fill material are all distinguishable in that, in those cases, the defendant was the party that originally discharged the dredged or fill material. In the present case, it is undisputed that the Milners did no such thing.

DATED at Seattle, Washington this 3rd day of October, 2002.

/s/ Barbara J. Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

33 U.S.C. Section 403

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. Section 406

Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of a misdemeanor, and on conviction thereof shall be

punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

33 U.S.C. Section 407

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or

by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided,* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further,* That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

(4)

No. 09-820

In The

Supreme Court of the United States

MARY D. SHARP,

Petitioner,

vs.

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, and THE LUMMI NATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF LUMMI NATION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Does an upland owner commit a trespass when she refuses a request by the owner of the tidelands to remove rock rip rap that is located on the tidelands?

2. Under the "common enemy" doctrine, can an upland owner deprive a tideland owner of its vested right to the benefits of an ambulatory tidal boundary by placing rock rip rap to permanently "fix" the location of the tidal boundary?

3. Does *stare decisis* militate against revisiting the issue of tidelands ownership on the Lummi Reservation, when three prior cases in the Ninth Circuit have held that the State of Washington does not own the tidelands, and the State declined to assert ownership in this proceeding?

4. Was an Executive Order, signed by President Grant and authorized by Congress when it ratified the Treaty of Point Elliott, sufficient to reserve title to tidelands on the Lummi Reservation to the United States in trust for the Lummi Nation?

5. Is it a violation of Section 10 of the RHA for an upland owner to refuse to remove shore defense structures that were originally erected on the uplands, but are now located seaward of the mean high water mark due to movement of the boundary between upland and tideland?

6. Did the District Court abuse its discretion in issuing an injunction under the RHA?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Petitioner has correctly identified the parties to the proceedings below.

CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee Lummi Nation is a federally recognized Tribe of American Indians. It has no parent companies, subsidiaries or affiliates that have issued shares to the public.

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JURISDICTION

Petitioner correctly states the basis for this Court's jurisdiction.

TREATY, EXECUTIVE ORDER & STATUTORY PROVISIONS AT ISSUE

This case involves interpretation of the Treaty of Point Elliott, an 1873 Executive Order issued by President Grant, Section 4 of Washington's statehood act, and the Rivers and Harbors Act, 33 U.S.C. §401 *et seq*. The Treaty is set out verbatim in this Brief starting at page App-1. The Executive Order is set out verbatim in this Brief starting at page App-14. The text of the relevant provisions of the Rivers and Harbors Act are set out in Petitioner's Brief starting at App-109.

The relevant part of Section 4 of Washington's statehood act provides:

> *Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled*, That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana and Washington, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.
>
> . . . .

> *Sec. 4.* . . . That the people inhabiting said proposed States to agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian Tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . .

Washington et al. Statehood Act, Act of Feb. 22, 1889, c. 180, Sec. 4, 25 Stat. 676.

ERRORS IN PETITION FOR CERTIORARI

In accordance with Supreme Court Rule 15(2.), Lummi notes the following misstatements made by Petitioner in her Petition:

1. Petitioner asserts that Lummi is claiming "an unrecognized right to perpetual erosion". *Cert. Petition at 17.* That statement is both incorrect and misleading. Lummi does not claim a "right to erosion". Lummi claims that an adjoining uplands owner cannot unilaterally alter an inherent aspect of Lummi's title: the natural right to an ambulatory boundary.

2. Petitioner states:

> [W]hen an upland owner's property increases through the deposit of alluvion (or reliction), it is not at the expense of the tideland owner. The tidelands simply move (in this case, to the west) from their former location.

Cert. Petition at 17-18. This statement is both misleading and factually incorrect. Offshore currents and other erosive forces may prevent the seaward boundary of the tidelands from moving offshore when the upland accretes. This can cause the area of the tidelands to be diminished on both the landward and the seaward sides when the upland accretes. Moreover, structures such as Petitioner's bulkhead and rock rip rap change the natural dynamics of the beach in many ways that are harmful to the tidelands. Bulkheads and other shore-armoring devices can degrade nearshore habitats that provide food for fish, including salmon. Spawning areas for certain species of fish may be lost due to removal of fine sediments from the intertidal zone. *Lummi App-50 to 53*; *Lummi App-56 to 59*. Shore defense structures can also reduce the amount of shoreline area available for use by fish, shellfish, marine mammals and other marine life, and change the slope of the beach due to the "scouring" effect of bulkheads. *Id.* When the slope of the beach increases, the area of the tidelands is reduced, because tidelands are measured by the intersection of tidal elevations with the slope of the beach. *Id.* The District Court specifically found

that Lummi was losing tidelands as a result of the homeowners' shore defense structures:

> Here, Defendants' shore defense structures do not result in merely incidental injury. Rather, these structures deny the United States and the Lummi Nation land that would otherwise accrue to them through erosion.

Petitioner's App-68.

3. Petitioner states that her bulkhead and rip rap were originally erected on her own land, not in the tidelands. *See, e.g., Cert. Petition at 2, 6.* Although this possibly is true as to the wooden bulkhead, there was conflicting evidence below as to whether Petitioner's rip rap originally was placed above or below the mean high water mark. The District Court did not resolve this question, but simply assumed for purposes of decision that all of Petitioner's structures were originally placed above the mean high water mark, and that erosion of the beach in the area of the rip rap had resulted in some of the rocks being located below mean high water. *Petitioner's App-65.*

4. Petitioner states that mean high water "intersects Homeowners' riprap during some periods and not during others". *Cert. Petition at 6.* Lummi has not been able to find any evidence in the record below that supports this statement. The only evidence in the record on the location of the Petitioner's riprap in relation to mean high water is a 2002 survey submitted by Plaintiffs, which shows that a

portion of Petitioner's rip rap is seaward of mean high water. *ER 231 at page 8.*

5. Petitioner asserts that she was not a member of the Sandy Point homeowner's association that executed the tidelands lease. *Cert. Petition at page 10 n. 4.* Lummi has not been able to find any evidence in the record below to support this statement. Moreover, Petitioner's statement is misleading. Petitioner does not, and cannot, dispute that the tidelands adjacent to her home were included in the 1963 tidelands lease, *Lummi App-29 to 37*,[1] and she admits that she and her predecessor in title erected a seawall and placed rip rap on the beach both during the term of the Lease, and after it expired. *Cert. Petition at 5-6.* Whether Petitioner was a member of the Sandy Point homeowner's association is irrelevant.

6. Petitioner claims that the Court of Appeals "criticize[d] the Homeowners for failing to reach a settlement with the Lummi Nation", and asserts that this criticism was "outrageous". *Cert. Petition at 10.* However, the statements to which Petitioner refers were not critical of Petitioner. At Petitioner's App-28, the Court of Appeals merely pointed out that its ruling on the trespass claim did not necessarily require removal of the shore defense structures, since the Homeowners still had the option of entering into a

---

[1] The lease covers tidelands adjacent to Government Lot 1, Section 17, in which Petitioner's vacation home is located. *Lummi App-34.*

new lease with Lummi, and Lummi was willing to accommodate them. At Petitioner's App-44, the Court of Appeals pointed out that it had no choice but to rule on the merits since the parties were unable to reach an agreement. There is nothing outrageous about either of these statements.

STATEMENT OF THE CASE

This case presents no issues meriting review by this Court. The courts below applied well-settled rules governing littoral boundaries and ownership of lands reserved to Indian Tribes to a set of unique facts involving a small Indian Reservation on the coast of Washington state. Petitioner is simply unhappy with a result the law requires her to accept.

A. Overview.

Petitioner is the owner of a waterfront vacation home within the Sandy Point development, located on the Lummi Reservation near Bellingham, Washington. In 1963, a homeowners association leased the tidelands surrounding Sandy Point from the Lummi Nation ("Lummi"). The lease included the tidelands adjacent to Petitioner's vacation home. As required by federal law (25 U.S.C. §415), the lease had a maximum term of 25 years, but the homeowners association was granted an option to renew for an additional 25 years. The lease specifically authorized upland landowners to fill tidelands and erect

bulkheads on the beach to protect their property. The lease also required the landowners to remove those structures if the lease should ever expire without renewal.

During the term of the lease many Sandy Point homeowners erected bulkheads or seawalls and placed large rocks on the beach. Petitioner's predecessor in title erected a wooden bulkhead in 1977. Petitioner purchased her home in 1980. She added rock rip rap seaward of the bulkhead in 1982 and again in 1993. Rip rap consists of irregularly shaped rocks of varying size that are placed in an array in front of a structure or shore bank. Seawater that would otherwise strike the structure or bank first encounters the jumble of rock, which dissipates some of the force of the water by breaking up the waves and allowing the water to flow into the spaces among the rocks.

Over the years, the Sandy Point shoreline has eroded, in part because the structures erected by the Sandy Point owners themselves tend to create a "scouring" action that carries sand away from the beach. It is uncontested that Petitioner's rip rap was, no later than 2002, seaward of the mean high water mark and therefore within Lummi's tidelands.

The tidelands lease expired in 1988, and Lummi's repeated offers to renew it were rejected. In March 1988, the Lummi Nation sent a letter to the Homeowners, informing them (1) that the lease was expiring, and (2) that if they elected not to exercise the

option to renew the lease, any encroaching shore defense structures would have to be removed. Years of fruitless discussion followed, during which time Petitioner reinforced her rip rap by adding additional rock. *Cert. Petition at 6.* In January 2001, the United States sent a letter informing Homeowners that they would be sued if they did not remove their rip rap. When they refused, the United States filed suit in the District Court for the western district of Washington, alleging, *inter alia,* a trespass claim and a violation of the RHA. Lummi intervened as a Plaintiff, to protect its interests in the tidelands.

B. Rulings Below on the Trespass Claim.

Both the District Court and the Court of Appeals ruled in favor of Lummi and the United States on the trespass claim. The Court of Appeals began its analysis by reaffirming that the tidelands adjacent to the Lummi Reservation were reserved to the United States in trust for Lummi:

> Prior quiet title actions make clear that President Grant's executive order was sufficient to prevent ownership from passing to Washington. In ***United States v. Romaine***, the United States sought to quiet title against individuals who had bought Lummi tidelands from the state of Washington. 255 F. 253, 253 (9th Cir. 1919). This court held the president's executive order to be decisive and rejected an argument that the reservation extended only to the high-water mark.

> *Id.* at 259-60. ***Romaine*** noted that when Washington was admitted as a state, it disclaimed any right and title
>
> > to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

Id. at 260 (quoting Act of Feb. 22, 1889, ch. 180, §4, 25 Stat. 676, 677). ***United States v. Milner***, 583 F.3d 1174, 1184 (9th Cir. 2009). The Court of Appeals went on to discuss ***United States v. Stotts***, 49 F.2d 619 (W.D.Wa. 1930), which quieted title to the Lummi tidelands in the United States, and ***United States v. Washington***, 969 F.2d 752, 755-56 (9th Cir. 1992), where the "the state [of Washington] took the position that the Lummi reservation extends to the low-tide line and did not claim the tidelands." ***Milner***, 583 F.3d at 1184. After noting that the state of Washington had expressly declined to claim ownership of the tidelands and intervene in the present case, the Court of Appeals pointed out that *stare decisis* "applies with special force to decisions affecting title to land" and concluded that there was "no reason . . . to overturn 90 years of precedent, especially when the supposed title holder has declined to claim ownership". *Id.* at 1185. The Court of Appeals rejected Petitioner's

argument that the State of Washington acquired ownership of the tidelands at statehood under the "equal footing" doctrine. *Id.* at 1185-86.

After confirming title in the United States, the courts below applied the well-settled rule that the boundary between upland and tideland is ambulatory, moving as the shoreline accretes and erodes. 583 F.3d at 1187. The Court of Appeals pointed out that the right to an ambulatory boundary is a vested property right:

> [B]oth the tideland owner and the upland owner have a right to an ambulatory boundary, and each has a vested right in the potential gains that accrue from the movement of the boundary line. The relationship between the tideland and upland owners is reciprocal: any loss experienced by one is a gain made by the other, and it would be inherently unfair to the tideland owner to privilege the forces of accretion over those of erosion. Indeed, the fairness rationale underlying courts' adoption of the rule of accretion assumes that uplands already are subject to erosion for which the owner otherwise has no remedy.

Id. at 1188.

The Court of Appeals specifically followed the rule set out in ***County of St. Clair v. Lovingston***, 90 U.S. 46, 68-69 (1874):

> The riparian right to future alluvion is a vested right. It is an inherent and essential

> attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim '*qui sentit onus debet sentire commodum*' lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property.

It is this inherent and essential attribute that Petitioner now asks this Court to change.

The courts below rejected Petitioner's argument that she had somehow "fixed" the ambulatory boundary when she erected her shore defense structures:

> The Homeowners have the right to build on their property and to erect structures to defend against erosion and storm damage, but all property owners are subject to limitations in how they use their property. The Homeowners cannot use their land in a way that would harm the Lummi's interest in the neighboring tidelands. Given that the Lummi have a vested right to the ambulatory boundary and to the tidelands they would gain if the boundary were allowed to ambulate, the Homeowners do not have the right to permanently fix the property boundary absent consent from the United States or the Lummi Nation. The Lummi similarly could not erect structures on the tidelands that would permanently fix the boundary

> and prevent accretion benefitting the Homeowners.

Id. at 1189-90. The Court of Appeals also rejected the argument that the "common enemy" doctrine allows an upland owner to "fix" the boundary. 583 F.3d at 1188-89.

Based on the foregoing, the courts below concluded that Petitioner's rock rip rap was encroaching on Lummi's tidelands, 583 F.3d at 1191, and would have to be removed unless Petitioner entered into a new agreement with Lummi.

C. Rulings Below on the Rivers and Harbors Act Claim.

The courts below held that Petitioner had violated the Rivers and Harbors Act by failing to remove her rip rap from the navigable waters of the United States. 583 F.3d at 1191-94. Lummi was not involved in this claim.

D. Petitioner's Appeal.

All of the Homeowner-Defendants except Petitioner have either executed, or are in the process of negotiating, new tideland use agreements with the Lummi Nation. Petitioner alone seeks review by the Supreme Court of the rulings on both the trespass and RHA claims.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. The Trespass Claim.

One hundred and twenty years ago, this Court held:

> Where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary; and a deed describing the lot by number or name conveys the land up to such shifting water line, exactly as it does up to the fixed side lines; so that, as long as the doctrine of accretion applies, the water line, no matter how much it may shift, if named as the boundary, continues to be the boundary, and a deed of the lot carries all the land up to the water line.

Jefferis v. East Omaha Land Co., 134 U.S. 178, 188 (1890). The Court of Appeals faithfully followed this principle:

> Under the common law, the boundary between the tidelands and the uplands is ambulatory; that is, it changes when the water body shifts course or changes in volume. *See* ***Jefferis v. East Omaha Land Co.***, 134 U.S. 178, 189, 10 S.Ct. 518, 33 L.Ed. 872 (1890); ***California ex rel. State Lands Comm'n v. United States***, 805 F.2d 857, 864 (9th Cir. 1986); ***United States v. Boynton***, 53 F.2d 297, 298 (9th Cir. 1931). The uplands owner loses title in favor of the tideland owner – often the state – when land is lost to the sea by erosion or submergence. The

> converse of this proposition is that the littoral property owner gains when land is gradually added through accretion, the accumulation of deposits, or reliction, the exposure of previously submerged land. *See* ***County of St. Clair [v. Lovingston]***, 90 U.S. at 68-69, 23 Wall. 46; ***Jefferis***, 134 U.S. at 189, 10 S.Ct. 518; 65 C.J.S. Navigable Waters § 95 (2009). These rules date back to Roman times, and have been noted in Blackstone's Commentaries and many other common law authorities and cases.

583 F.3d at 1187.

Petitioner does not cite any authority holding to the contrary, and cannot dispute that this has been the law for at least 120 years. Instead, she asks this Court to overrule this long-standing precedent and create a new rule that an uplands owner can, by erecting shore defense structures, unilaterally deprive the tideland owner of its vested right to the benefits that may accrue from an ambulatory boundary. For a multitude of reasons, this Court should refuse to entertain Petitioner's request.

A. The Court of Appeals decision is very limited in scope and impact.

Contrary to the cries of alarm and doom that fill Ms. Sharp's Petition, the factual context of this case is unique. The case presents a federal question only because it involves tidelands beneficially owned by an Indian tribe within an established Indian

Reservation. That situation is not even typical of Indian Reservations located in western Washington state. *Compare* ***United States v. Aam***, 887 F.2d 190, 196-97 (9th Cir. 1989) (tidelands not included in Suquamish reservation) *and* ***Skokomish Tribe v. France***, 320 F.2d 205, 210 (9th Cir. 1963), *cert. denied*, 376 U.S. 943 (1964) (tidelands not included in Skokomish reservation). To the best of Lummi's knowledge, no comparable facts exist in "the entire City of New Orleans, Boston's Back Bay, major portions of San Francisco, San Jose and Seattle" as Petitioner theorizes. *Cert. Petition at 14.*

Contrary to Petitioner's assertion, *Cert. Petition at 12 n. 6*, where tidelands owned by the State or private persons are involved, state law will determine the incidents and consequences of property ownership, including doctrines such as adverse possession that can be used to stabilize titles where fill and bulkheads have been placed in privately owned tidelands or tidelands owned by the State. *See, e.g.*, ***Borax Consolidated Ltd. v. Los Angeles***, 296 U.S. 10, 22 (1935) ("Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law.") As to land where title is held by or derived from the United States, state law will often be borrowed as the rule of decision:

> Controversies governed by federal law do not inevitably require resort to uniform federal rules. It may be determined as a matter of choice of law that, although federal law should govern a given question, state law

> should be borrowed and applied as the federal rule for deciding the substantive legal issue at hand.

California ex rel. State Lands Comm'n v. United States, 457 U.S. 273, 283 (1982) (citations omitted). Only in the rare case will local law not govern, and the Court of Appeals decision below therefore will necessarily have very limited application elsewhere.

B. The Court would have to overrule more than 120 years of littoral boundary law and *Wilson v. Omaha Indian Tribe* to grant the relief Petitioner seeks.

Petitioner concedes that ***Wilson v. Omaha Indian Tribe***, 442 U.S. 653, 678 (1979), mandates consideration of state law in real property cases on Indian reservations,[2] and that the Washington Supreme Court has expressly rejected the common enemy doctrine where sea water is involved. ***Grundy v. Thurston County***, 155 Wn.2d 1, 10 (2005).[3]

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[2] In ***Wilson***, the Court held that the local law *(there, the law of Nebraska)* of accretion and avulsion should be considered when deciding whether the Omaha Tribe or the State of Nebraska owned certain riparian land on the Omaha Reservation. The Court reasoned that, although the determination of titles to reservation lands is a matter of federal law, "federal law should incorporate the applicable state property law to resolve the dispute", 442 U.S. at 678, unless an overriding federal interest requires use of a uniform federal rule.

[3] In ***Grundy***, the owner of land on the coast increased the height of a seawall, which in turn caused seawater to surge onto

(Continued on following page)

Nonetheless, Petitioner appears to ask this Court to (1) adopt the common enemy doctrine as a matter of federal common law and (2) apply that new rule here. In order to do so, this Court would have to overrule ***Wilson*** and its progeny, as well as the long line of cases holding that the boundary between upland and tideland is ambulatory.

The Court would also have to contort the logic behind the common enemy doctrine. As the Court of Appeals explained, the "common enemy" doctrine does not fit in the context of littoral boundaries:

> On the one hand, the injury complained of is not the diversion of water onto the tidelands; rather, it is the physical encroachment of the shore defense structures themselves. . . . On the other hand, the rule is inapposite because the water is not acting as a "common enemy" of the parties involved. The tide line is an inherent attribute of the properties at issue, since it dictates where the tidelands end and the uplands begin. That the boundary is ambulatory does not make it a common enemy, since any movement seaward or landward is to the benefit of one party and the detriment of the other.

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a neighbor's land. After the neighbor filed a private nuisance action, the owner asserted a "common enemy" defense, claiming a right to deflect sea water by any means. The Washington Supreme Court rejected the defense, and held that the common enemy doctrine did not apply to seawater. 155 Wn.2d at 10.

583 F.3d at 1189. Where erosion and accretion are natural and normal events that affect property boundaries, the action of the water is neither an "enemy" common to both parcels nor the type of extraordinary event to which the doctrine is applicable. Indeed, the ambulatory boundary can been seen as a "friend" to the property owner who receives the accretion.

C. State law was properly adopted here.

Petitioner does not explain why it was error for the Court of Appeals to adopt state law as the rule of decision; she just asks this Court to establish a different federal rule. However, this Court has already rejected the argument that a uniform federal rule is necessary in cases such as this:

> [W]e perceive no need for a uniform national rule to determine whether changes in the course of a river affecting riparian land owned or possessed by the United States or by an Indian tribe have been avulsive or accretive. For this purpose, we see little reason why federal interests should not be treated under the same rules of property that apply to private persons holding property in the same area by virtue of State, rather than federal, law. . . . ***We should not accept "generalized pleas for uniformity as substitutes for concrete evidence that adopting State law would adversely affect [federal interests].***"

Wilson, 442 U.S. at 673 *(emphasis added; citation omitted)*. Petitioner has not identified ***any*** federal interests that might be adversely affected by refusing to apply the "common enemy" doctrine to seawater, nor are there any obvious ones.[4]

D. The "common enemy" rule has been rejected by courts around the country.

Petitioner asserts that the Court of Appeals "announced a startling change in the common law" when it refused to apply the "common enemy" doctrine. *Cert. Petition at 15.* That is not true. As the Court of Appeals pointed out, courts all around the country have rejected the "common enemy" doctrine:

> Many jurisdictions have dispensed with the [common enemy] doctrine altogether and instead apply a rule of reasonableness, under which "each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, but incurs liability when his harmful interference with the flow of surface waters is unreasonable." *[String citation omitted.]* While Washington has retained the doctrine, it has modified the rule so that property owners

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[4] In ***California ex rel. State Lands Comm'n v. United States***, 457 U.S. 273 (1982), the Court followed ***Wilson***, but concluded that significant federal interests present in that case militated in favor of application of a federal rule that differed from state law. That is not true here.

> must exercise due care by "acting in good faith and avoiding unnecessary damage to the property of others," *[citation omitted]* and by making the rule inapplicable to sea water. *Grundy*, 117 P.3d at 1094. It is far from clear, then, that the common enemy rule, as advocated by Homeowners, is even the dominant view.

583 F.3d at 1189 n. 10.

E. The new rule Petitioner seeks does not fairly balance the equities.

Implicit in Petitioner's request for a new rule of law is the notion that her use of the uplands for a vacation home is more valuable than the uses to which the tidelands may be put. Lummi strongly disagrees, for the reasons stated by the Court of Appeals in its decision below:

> [W]e decline to hold that the use of uplands is inherently more valuable than the use to which tidelands can be put. As was already noted, the tidelands have played an important role in the Lummi's traditional way of life, and in most other areas, the tidelands are held by the state in trust for the public. *See* ***Illinois Central R.R. Co. v. Illinois***, 146 U.S. 387, 436-37, 13 S.Ct. 110, 36 L.Ed. 1018 (1892). These interests are substantial, and the uses they represent are not obviously less productive. *See* ***Shively v. Bowlby***, 152 U.S. 1, 57, 14 S.Ct. 548, 38 L.Ed. 331 (1894) ([Lands under tide waters]

> are of great value to the public for the purposes of commerce, navigation, and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right.)

583 F.3d at 1188. The uplands and tidelands both have value, and the rule applied by the courts below recognizes that important fact. There is no reason to grant review.

F. The facts do not support Petitioner's argument and do not justify granting the Petition.

Petitioner claims that the Court of Appeals "assume[d] that the property line [between upland and tideland] ignores the existing structure and, instead, permeates it and places the boundary as if the structure had never existed." *Cert. Petition at 16.* However, insofar as Petitioner's rip rap is concerned, this was not an assumption, because Petitioner's rip rap does not, in fact, form a solid barrier against the sea. The rocks are irregularly sized and shaped. There are spaces between them. The tide still flows around them, through the spaces between them, and beyond the rocks themselves. Thus, Petitioner's rip rap does not stop the tide and does not arrest the boundary. The boundary between Petitioner's uplands and Lummi's tidelands remains ambulatory as a matter of fact to this day. Thus, even ***if*** there were some merit to the argument that an impermeable barrier to the sea "fixes" the boundary

line, Petitioner would not be entitled to the benefit of such a rule under the facts of this case.

G. Petitioner can maintain her shore defense structures simply by executing a new tidelands agreement.

Petitioner tries to create the impression that she will lose her vacation home to the sea unless certiorari is granted. However, Lummi has always remained ready and willing to enter into a new tidelands agreement with Petitioner, which would permit Petitioner to maintain and improve her shore defense structures as needed. The sea may eventually take Petitioner's vacation home, but only as a result of natural forces and Petitioner's refusal to take a readily available alternative to protect her own interests to the extent possible.

Petitioner claims that she has "always been willing to pay the tideland owner for the fair market value" of the tidelands she is using, but she couples that assertion with her claim that Washington state is the true tideland owner. *Cert. Petition at 11 n. 5.* In any event, that assertion is not supported by the record below, nor was any evidence introduced below as to what constitutes "fair market value" in this case.

Petitioner seems to think that she is entitled to decide what price Lummi should charge for the use of its property. *Cert. Petition at 10-11.* To the contrary, Lummi is free to charge whatever it deems

reasonable, taking into account the benefit Petitioner derives from her use of the tidelands, the consequent loss of use Lummi will suffer, Lummi's reliance on fisheries, and the adverse effect shore defense structures have on fish habitat. Petitioner's suggestion that Lummi is asking a confiscatory amount of rent is rebutted by the fact that other tideland owners have accepted Lummi's terms. Indeed, resolution of this dispute by agreement would likely promote Petitioner's property values.

The decisions of the courts below on the trespass claim do not present any new or novel questions, are consistent with well-settled law, and have limited application elsewhere. In order to give Petitioner the relief she seeks, this Court would have to overrule 120 years of established precedent, and apply a common law rule that is being widely rejected by the courts. There is no reason to grant certiorari as to the trespass claim.

II. Ownership of the Tidelands.

The courts below concluded that the tidelands within the Lummi Reservation are owned by the United States in trust for Lummi, not by the State of Washington under the "equal footing" doctrine. Petitioner asks this Court to grant certiorari because this ruling was contrary to prior decisions of this Court. *Cert. Petition at 33, 35, 36.* This request should be denied, because Petitioner has failed to demonstrate that the Court of Appeals created new law or

that a conflict exists among the circuits. She argues only that the courts below incorrectly concluded that the equal footing doctrine had been satisfied. That is *per se* insufficient to justify review by this Court.

A. The bases for the Court of Appeals decision.

As a preliminary matter, Petitioner claims that there were three bases for the Court of Appeals decision on the ownership issue, *Cert. Petition at 34,* when in fact there were only two. The Court of Appeals held:

1. The ownership issue has been decided in favor of Lummi and the United States in three prior Ninth Circuit cases, and the doctrine of *stare decisis*, which applies with extra force in the case of issues affecting property titles, militates against revisiting that issue at this late date. 583 F.3d at 1183-1185.

2. Even if the ownership issue were revisited, it would be decided the same way under present "equal footing" caselaw. 583 F.3d at 1185-1186.

Petitioner claims that the Court of Appeals also relied on the fact that the State of Washington was not a party to the proceeding. *Cert. Petition at 35.* That is not true. The Court of Appeals expressly ruled in Petitioner's favor on this point, holding that

Petitioner was free to assert that the State owned the tidelands:[5]

> The United States argues that the Homeowners cannot assert Washington state's title in the tidelands because in a trespass action "[t]itle in a third person may not be alleged by a defendant who is not in privity of title with the third person", and the Homeowners do not claim to be in privity with the state. . . . However, this applies where the plaintiff is the one in possession and, in moving for partial summary judgment on the issue of ownership, the United States did not present evidence showing that it or the Lummi Nation was currently in possession of the tidelands.

583 F.3d at 1183 n. 7.

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[5] By noting this holding, Lummi does not concede that the conclusion by the Court of Appeals was correct. The State of Washington is certainly bound by the quiet title decisions in the prior cases. It is difficult to see how Petitioner's ability to litigate the ownership issue could be greater than the entity she claims to be the owner. Nonetheless, the Court of Appeals did allow Petitioner to argue in favor of state ownership even though the state was not a party to the case and had declined to assert ownership in its own right.

B. The Court of Appeals correctly held that the doctrine of *stare decisis* precludes relitigation of the ownership issue here.

The doctrine of *stare decisis,* which precludes relitigation of issues previously decided, applies with special force in proceedings involving title to land:

> Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change. Parties should not be encouraged to speculate on a change of the law when the administrators of it change. Courts ought not to be compelled to bear the infliction of repeated arguments by obstinate litigants, challenging the justice of their well-considered and solemn judgments.

Minnesota Mining Co. v. National Mining Co., 70 U.S. 332, 334 (1865).

Here, Petitioner admits, as she must, that there are three prior cases expressly holding that the United States owns the Reservation tidelands in trust for Lummi. *Cert. Petition at 34 n. 15.* In ***United States v. Romaine***, 255 F. 253 (9th Cir. 1919), the Court of Appeals rejected the argument that the State of Washington succeeded to title of tidelands on the perimeter of the Lummi Reservation by virtue of the "equal footing" doctrine, and held that the United States holds title in trust for Lummi. Petitioner attempts to distinguish ***Romaine*** on the grounds that different tidelands, which were expressly reserved in the Treaty of Point Elliot, were at issue there. However, the ***Romaine*** court did not reject the equal footing doctrine as a source of state title on the grounds that the specific lands in question were part of the island reserved in the Treaty. It rejected the equal footing doctrine because the Executive Order reserved all the tidelands described therein from the state for an appropriate public purpose (creation of an Indian Reservation). Additionally, it held that Congress approved the reservation when it required Washington to forever disclaim all right and title to "all lands lying within said limits owned or held by any Indian or Indian tribes" when Washington was admitted to the Union. *Act of Feb. 22, 1889, c. 180, Sec. 4, 25 Stat. 676, cited in* ***Romaine***, 255 F. at 260. ***Romaine*** unquestionably resolved the issue Petitioner attempts to raise here.

United States v. Stotts, 49 F.2d 619 (W.D.Wash. 1930), was the second case to hold that the United

States holds title to the Lummi tidelands. Petitioner claims that ***Stotts*** is inapposite because "it is not clear where the tidelands in that case were located or whether they were reserved by the Executive Order alone." *Cert. Petition at 35 n. 15.* However, the evidence below conclusively proved that the lands at issue were located along Sandy Point, in the portion of the Reservation added by the 1873 Executive Order. *Lummi App-15, 20-21.*

In ***United States v. Washington***, 969 F.2d 752, 753 (9th Cir. 1992), *cert. denied*, 507 U.S. 1051 (1993), the State of Washington conceded that it has no claim to the lands above the low water mark. Petitioner attempts to distinguish this case as well, but even Petitioner cannot dispute that the State of Washington made the concession relied upon by the Court of Appeals.[6]

Given (1) that no less than three prior cases[7] have held that the United States, not the State of

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[6] The State also declined an invitation by the Homeowners to intervene in the present proceeding to assert State title to the tidelands.

[7] Only a year after ***Stotts*** was decided, the Court of Appeals issued a decision in yet another quiet title case involving Lummi Reservation tidelands. In ***United States v. Boynton***, 53 F.2d 297 (9th Cir. 1931), the defendant generally conceded tribal ownership of the tidelands, arguing only that the meander line of the upland surveys was a fixed boundary line, which was not affected by subsequent erosion or accretion. The Court of Appeals rejected that contention, as did the courts in the present case.

Washington, owns the tidelands on the Lummi Reservation, and (2) that the State of Washington accepts that ruling and no longer claims ownership of the tidelands, the Court of Appeals correctly applied the doctrine of *stare decisis*. Petitioner now asks this Court to overturn a ruling that has stood for over 90 years, and upon which the United States, the Lummi Nation, and the State of Washington have relied to conduct their affairs, without giving any reason for the Court to do so. *Stare decisis* cannot be so easily ignored:

> Time and time again, this Court has recognized that "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *[Citations omitted.]* Adherence to precedent promotes stability, predictability, and respect for judicial authority. . . . [W]e will not depart from the doctrine of *stare decisis* without some compelling justification.

Hilton v. South Carolina Public Railways Comm'n, 502 U.S. 197, 202 (1991). There is no such justification here.

C. The courts below followed *Idaho v. United States* and correctly concluded that the State of Washington did not acquire title to the tidelands at statehood under the "equal footing" doctrine.

Petitioner admits that the Court of Appeals correctly relied on the two-part test from ***Idaho v.***

United States, 533 U.S. 262 (2001), and similar cases, to determine whether the tidelands passed to the State of Washington under the "equal footing" doctrine. *Cert. Petition at 36.* That test is:

> (1) Whether there was an intent to include land under navigable waters *within the federal reservation*, and
>
> (2) If so, whether Congress intended to defeat the future State's *title* to the submerged lands.

533 U.S. at 273 *(emphasis added).*

Petitioner concedes, as she must, that the first part of the test is satisfied: the tidelands were expressly included in the legal description in the Executive Order that created the Lummi Reservation. Petitioner objects only to the rulings on the second part of the ***Idaho*** test. Petitioner's objections are not well-taken.

The Lummi Reservation was created by the Treaty of Point Elliott, *12 Stat. 927.* Congress was aware of the importance of fishing to the Northwest Indians like Lummi, because the Treaty reserved an exclusive right of fishing for the Tribes within the area and boundary waters of their reservations, as well as reserving to the Tribes the right to off-reservation fishing "at all usual and accustomed grounds and stations". ***United States v. Washington***, 384 F. Supp. 312, 332 (W.D. Wa. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). Given the central role of the beaches in tribal

life, the universal dependence of the Lummis on tideland resources, and the fact that many of the allotments authorized by the Treaty would be located away from the beaches, *Lummi App-41 to 47,* Indian ownership and use of the beaches was necessary for the Reservation to be successful. The Treaty set aside all the lands within the Reservation for the Indians' "exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands," *12 Stat. 927 at Art. 2.*

Article 7 of the Treaty provided that the "President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to . . . such other suitable place within said Territory as he may deem fit." *12 Stat. 927 at Art. 7.* Congress approved the discretionary power that Article 7 conferred on the President when it ratified the Treaty in 1859. "When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress." ***Dames & Moore v. Regan***, 453 U.S. 654, 668 (1981).

In 1873, President Grant exercised his delegated power to add the Sandy Point area to the Reservation and to make it plain that the Reservation boundary extended to "the low water mark on the Gulf of Georgia", explicitly encompassing the tidelands at

issue here.[8] *Executive Order, 12 Stat. 928.* If there were no intent to include the tidelands, the description would have run to the high water mark, which is the landward boundary of tidelands. And there was no reason to include tidelands at the edge of the Reservation if there was no intention to reserve those tidelands for the future use of the Indians.

Since President Grant's intent to reserve the Lummi tidelands for the sole benefit of the Indians was "made plain" from the face of the Executive Order, the Executive Order "placed Congress on notice that the President had construed his reservation authority to extend to submerged lands and had exercised that authority to set aside . . . submerged lands in the Reserve". *See* ***Alaska v. United States (Arctic Coast)***, 521 U.S. 1, 45 (1997). When the State of Washington was admitted to the Union in 1889, Congress required the State, as a condition of statehood, to disclaim any interest in any lands "owned or held by any Indian or Indian Tribe" until the United States had extinguished the Indians' title. *Act of Feb. 22, 1889, c. 180, Sec. 4, 25 Stat. 676.*[9]

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[8] The Executive Order expressly noted that much of the land within the legal description was "a part of the island already set apart by the second article of the treaty". *12 Stat. 928.*

[9] "[The State of Washington shall] forever disclaim all right and title . . . to all lands within said limits owned or held by any Indian or Indian tribe; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said

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There would have been no reason for Congress to require the new state to disclaim interests in submerged lands on Indian reservations unless Congress intended to continue President Grant's reservation of those tidelands for the benefit of the Tribes.

Petitioner argues that the Court of Appeals made "a radical departure from this Court's jurisprudence" by relying on allegedly "boilerplate"[10] disclaimer language in Washington's statehood act. *Cert. Petition at 36.* However, as Petitioner admits in a footnote, the ***Idaho*** Court relied in part on a similar "boilerplate" disclaimer to find that the United States, not the State of Idaho, owned submerged lands on the Coeur d'Alene reservation in trust for the Coeur d'Alene Tribe. *Cert. Petition at 37 n. 18.* And in ***Arctic Coast***, the Court considered similarly broad language in a proviso that related to unnamed wildlife refuges: "[provided] [t]hat such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife. . . . " 521 U.S. at 55. Petitioner claims that ***Arctic Coast*** supports her position, but does not explain how this generalized reference to "lands withdrawn or otherwise set apart as wildlife refuges" is any more specific

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Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." *Act of Feb. 22, 1889, c. 180, Sec. 4, 25 Stat. 676.* Parallel language was included in Washington's Constitution, Art. XXVI, as required by the Enabling Act.

[10] Congress included similar disclaimers in several statutes admitting other states to the Union.

than "lands owned or held by Indians or Indian tribes".

But even if prior decisions of this Court had not given effect to "boilerplate" disclaimers, the federal courts are not free to ignore statutory language simply because Congress has used it frequently. The focus of the inquiry should be on whether the meaning of the language is clear and the application of the language to the situation is certain. While there undoubtedly could be situations where it might be difficult to know whether specific lands were in fact "owned or held by an Indian or Indian tribe" at the time of statehood, this is not such a case. ***Idaho*** and ***Arctic Coast*** control here, and there is no need to grant certiorari to address this issue yet again.

III. The Rivers and Harbors Act Claim.

Lummi did not participate in this claim below, and therefore does not respond to the Petition for Certiorari on this claim, except as to the propriety of the injunction issued by the District Court.

A. There is no conflict among the lower courts on the issue of whether the District Court has discretion to issue an injunction under the Rivers and Harbors Act.

Petitioner claims that the Court of Appeals held that an injunction is "automatic" when the RHA has been violated. *Cert. Petition at 31.* That is not true.

The District Court's issuance of the injunction was clearly an exercise of discretion, and the Court of Appeals held that the District Court did not abuse its discretion. 583 F.3d at 1193-94. The District Court issued the injunction only after considering a number of factors, including the nature of the interest to be protected, the degree and kind of wrong, and the practicability of the remedy. *Petitioner's App-60 to 70.*

Petitioner also argues that the District Court should have balanced the equities before issuing the injunction. *Cert. Petition at 31 to 32.* However, none of the cases cited by Petitioner require the courts to do so before issuing an injunction under §406 of the RHA. ***State of South Carolina ex rel. Maybank v. South Carolina Electric & Gas Co.***, 41 F. Supp. 111, 118-19 (E.D.S.C. 1941), held only that the issuance of an injunction under the RHA is discretionary:

> When section 406 provides that the removal of prohibited structures 'may be enforced by the injunction of any district court' . . . , the Congress intended that . . . the district court . . . should exercise discretion in each instance in determining . . . whether an injunction should be granted. The Congress did not intend that it should be mandatory . . . on the district court to grant an injunction in every suit.

In ***United States v. Bailey***, 467 F. Supp. 925 (E.D.Ark. 1979), the district court exercised its discretion to deny injunctive relief based on inequitable conduct by the United States. Neither case mentions

balancing the equities, and ***United States v. Stoeco Homes, Inc.***, 498 F.2d 597, 611 (3rd Cir. 1974), expressly holds that balancing the equities is not required:

> No balancing of interest or need to show irreparable injury is required when an injunction is sought under §12 [of the RHA] to prevent erection or seek removal of an unlawful structure.

There is no conflict for this Court to resolve.

B. Petitioner left the District Court no choice but to grant injunctive relief.

As noted in the preceding paragraph, Congress intended to give the district courts discretion when it came to issuing injunctions under the RHA. Here, the District Court exercised its discretion to grant injunctive relief requiring Petitioner to remove her encroaching shore defense structures. This exercise of discretion was more than reasonable, given Petitioner's inequitable conduct here. Petitioner placed shore defense structures on Lummi's tidelands during the term of the Lease, or near those lands knowing that the location would soon be overtaken by the ambulatory boundary. She then refused to renew the lease on the grounds that her shore defense structures had unilaterally "fixed" the previously ambulatory boundary in her favor. Lummi could have similarly resorted to self-help and removed the rip rap that is sitting on its lands. Instead, it sought a

court resolution of the matter. Given the importance Petitioner places on being able to maintain her shore defense structures in the tidelands, and the loss of use of, and damage to, the tidelands that Lummi suffers from Petitioner's continued use of the tidelands, and Petitioner's refusal to enter into a use agreement with Lummi, there was no other remedial option open to the District Court.

The decision to grant injunctive relief was consistent with existing law and justified by the circumstances. A grant of certiorari would be neither necessary nor appropriate.

CONCLUSION

Petitioner chose to purchase a vacation home that was improvidently located too close to a shoreline that has been eroding for many years. Both she and her predecessor in title took advantage of the 1963 tidelands lease with Lummi to protect that home with shore defense structures. When that lease expired, Petitioner elected not to renew. Instead, she tried to get the benefit of the tidelands for nothing, claiming that shore defense structures built with Lummi's permission had somehow deprived Lummi of its ownership of the tidelands.

While it is certainly true that Petitioner will be better off if she can use Lummi's property free of charge, the courts below correctly concluded that the law does not allow Petitioner to unilaterally deprive

Lummi of its vested property rights in the tidelands. The solution, which has always been available to Petitioner, is to negotiate an agreement with Lummi for the use of its tidelands.

The issues presented here are unique to tidelands held in trust for tribes within established Indian Reservations. The parade of horribles conjured up by Petitioner and by amicus curiae below are fictional. Since this case presents no national issue on which this Court's resolution or guidance is needed, the Petition for Certiorari should be denied.

Dated: January 10, 2010.

Respectfully submitted,

HARRY L. JOHNSEN III
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Lummi Nation

TREATY WITH THE DWAMISH, SUQUAMISH, ETC., 1855.

Jan. 22, 1855. | 12 Stat. 927. Ratified Mar. 8, 1859. | Proclaimed Apr. 11, 1859.

Indian Affairs: Laws and Treaties. Vol. II (Treaties). Compiled and edited by Charles J. Kappler. Washington: Government Printing Office, 1904.

Articles of agreement and convention made and concluded at Múúcklte-óóh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, head-men and delegates of the Dwáámish, Suquáámish, Sk-táához, Sam-ááhmish, Smalh-kamish, Skope-ááhmish, Stkáá-mish, Snoquáálmoo, Skai-wha-mish, N" Quentlmáá-mish, Sk-táá-le-jum, Stoluck-whá-mish, Shaho-mish, Skáágit, Kik-i-áállus, Swin-áá-mish, Squináá-mish, Sah-ku-méehu, Noo-whá-ha, Nook-wachá-mish, Mee-séée-qua-quilch, Cho-bah-áá-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes, and duly authorized by them.

ARTICLE 1.

The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in

and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the Gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the Straits of Fuca, and crossing the same through the middle of Admiralty Inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's Canal and Admiralty Inlet to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty Inlet, and thence around the foot of Vashon's Island eastwardly and southeastwardly to the place of begining, including all the islands comprised within said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

ARTICLE 2.

There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish Bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the southeastern end of Perry's Island, called Sháális-quihl, and the island called Chah-choo-sen, situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia. All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them.

ARTICLE 3.

There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of Snohomish River, including

Tulalip Bay and the before-mentioned Kwilt-seh-da Creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said Territory. *Provided, however*, That the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

ARTICLE 4.

The said tribes and bands agree to remove to and settle upon the said first above-mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE 5.

The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purposes of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however*, That they shall not take shell-fish from any beds staked or cultivated by citizens.

ARTICLE 6.

In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of one hundred and fifty thousand dollars, in the following manner – that is to say: For the first year after the ratification hereof, fifteen thousand dollars; for the next two year, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for the next four years, seven thousand five hundred dollars each years; for the next five years, six thousand dollars each year; and for the last five years, four thousand two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may, from time to time, determine at his discretion upon what beneficial objects to expend the same; and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE 7.

The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on remunerating them for

their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

ARTICLE 8.

The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE 9.

The said tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the

property taken shall be returned, or in default thereof, of if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 10.

The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 11.

The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire others hereafter.

ARTICLE 12.

The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE 13.

To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of fifteen thousand dollars to be laid out and expended under the direction of the President and in such manner as he shall approve.

ARTICLE 14.

The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter"s shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like term of twenty years to instruct the Indians in their respective occupations. And

the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

ARTICLE 15.

This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year herein-before written. Isaac I. Stevens, Governor and Superintendent. [L. S.]

Seattle, Chief of the Dwamish and Suquamish tribes, his x mark. [L. S.]
Pat-ka-nam, Chief of the Snoqualmoo, Snohomish and other tribes, his x mark. [L. S.]
Chow-its-hoot, Chief of the Lummi and other tribes, his x mark. [L. S.]
Goliah, Chief of the Skagits and other allied tribes, his x mark. [L. S.]
Kwallattum, or General Pierce, Sub-chief of the Skagit tribe, his x mark. [L. S.]
S"hootst-hoot, Sub-chief of Snohomish, his x mark. [L. S.]

Snah-talc, or Bonaparte, Sub-chief of Snohomish, his x mark. [L. S.]
Squush-um, or The Smoke, Sub-chief of the Snoqualmoo, his x mark. [L. S.]
See-alla-pa-han, or The Priest, Sub-chief of Sk-tah-le-jum, his x mark. [L. S.]
He-uch-ka-nam, or George Bonaparte, Sub-chief of Snohomish, his x mark. [L. S.]
Tse-nah-talc, or Joseph Bonaparte, Sub-chief of Snohomish, his x mark. [L. S.]
Ns"ski-oos, or Jackson, Sub-chief of Snohomish, his x mark. [L. S.]
Wats-ka-lah-tchie, or John Hobtsthoot, Sub-chief of Snohomish, his x mark. [L. S.]
Smeh-mai-hu, Sub-chief of Skaiwha-mish, his x mark. [L. S.]
Slat-eah-ka-nam, Sub-chief of Snoqualmoo, his x mark. [L. S.]
St"hau-ai, Sub-chief of Snoqualmoo, his x mark. [L. S.]
Lugs-ken, Sub-chief of Skai-wha-mish, his x mark. [L. S.]
S"heht-soolt, or Peter, Sub-chief of Snohomish, his x mark. [L. S.]
Do-queh-oo-satl, Snoqualmoo tribe, his x mark. [L. S.]
John Kanam, Snoqualmoo sub-chief, his x mark. [L. S.]
Klemsh-ka-nam, Snoqualmoo, his x mark. [L. S.]
Ts"huahntl, Dwa-mish sub-chief, his x mark. [L. S.]
Kwuss-ka-nam, or George Snatelum, Sen., Skagit tribe, his x mark. [L. S.]
Hel-mits, or George Snatelum, Skagit sub-chief, his x mark. [L. S.]

S"kwai-kwi, Skagit tribe, sub-chief, his x mark. [L. S.]
Seh-lek-qu, Sub-chief Lummi tribe, his x mark. [L. S.]

S"h"-cheh-oos, or General Washington, Sub-chief of Lummi tribe, his x mark. [L. S.]
Whai-lan-hu, or Davy Crockett, Sub-chief of Lummi tribe, his x mark. [L. S.]
She-ah-delt-hu, Sub-chief of Lummi tribe, his x mark. [L. S.]
Kwult-seh, Sub-chief of Lummi tribe, his x mark. [L. S.]
Kwull-et-hu, Lummi tribe, his x mark. [L. S.]
Kleh-kent-soot, Skagit tribe, his x mark. [L. S.]
Sohn-heh-ovs, Skagit tribe, his x mark. [L. S.]
S"deh-ap-kan, or General Warren, Skagit tribe, his x mark. [L. S.]
Chul-whil-tan, Sub-chief of Suquamish tribe, his x mark. [L. S.]
Ske-eh-tum, Skagit tribe, his x mark. [L. S.]
Patchkanam, or Dome, Skagit tribe, his x mark. [L. S.]
Sats-Kanam, Squin-ah-nush tribe, his x mark. [L. S.]
Sd-zo-mahtl, Kik-ial-lus band, his x mark. [L. S.]
Dahtl-de-min, Sub-chief of Sah-ku-meh-hu, his x mark. [L. S.]
Sd"zek-du-num, Me-sek-wi-guilse sub-chief, his x mark. [L. S.]
Now-a-chais, Sub-chief of Dwamish, his x mark. [L. S.]
Mis-lo-tche, or Wah-hehl-tchoo, Sub-chief of Suquamish, his x mark. [L. S.]
Sloo-noksh-tan, or Jim, Suquamish tribe, his x mark. [L. S.]

Moo-whah-lad-hu, or Jack, Suquamish tribe, his x mark. [L. S.]
Too-leh-plan, Suquamish tribe, his x mark. [L. S.]
Ha-seh-doo-an, or Keo-kuck, Dwamish tribe, his x mark. [L. S.]
Hoovilt-meh-tum, Sub-chief of Suquamish, his x mark. [L. S.]
We-ai-pah, Skaiwhamish tribe, his x mark. [L. S.]
S"ah-an-hu, or Hallam, Snohomish tribe, his x mark. [L. S.]
She-hope, or General Pierce, Skagit tribe, his x mark. [L. S.]
Hwn-lah-lakq, or Thomas Jefferson, Lummi tribe, his x mark. [L. S.]
Cht-simpt, Lummi tribe, his x mark. [L. S.]
Tse-sum-ten, Lummi tribe, his x mark. [L. S.]
Klt-hahl-ten, Lummi tribe, his x mark. [L. S.]
Kut-ta-kanam, or John, Lummi tribe, his x mark. [L. S.]
Ch-lah-ben, Noo-qua-cha-mish band, his x mark. [L. S.]
Noo-heh-oos, Snoqualmoo tribe, his x mark. [L. S.]
Hweh-uk, Snoqualmoo tribe, his x mark. [L. S.]
Peh-nus, Skai-whamish tribe, his x mark. [L. S.]
Yim-ka-dam, Sr oqualmoo tribe, his x mark. [L. S.]
Twooi-as-kut, Skaiwhamish tribe, his x mark. [L. S.]
Luch-al-kanam, Snoqualmoo tribe, his x mark. [L. S.]
S"hoot-kanam, Snoqualmoo tribe, his x mark. [L. S.]
Sme-a-kanam, Snoqualmoo tribe, his x mark. [L. S.]
Sad-zis-keh, Snoqualmoo, his x mark. [L. S.]
Heh-mahl, Skaiwhamish band, his x mark. [L. S.]
Charley, Skagit tribe, his x mark. [L. S.]
Sampson, Skagit tribe, his x mark. [L. S.]
John Taylor, Snohomish tribe, his x mark. [L. S.]

Hatch-kwentum, Skagit tribe, his x mark. [L. S.]
Yo-i-kum, Skagit tribe, his x mark. [L. S]
T"kwa-ma-han, Skagit tribe, his x mark. [L. S.]
Sto-dum-kan, Swinamish band, his x mark. [L. S.]
Be-lole, Swinamish band, his x mark. [L. S.]
D"zo-lole-gwam-hu, Skagit tribe, his x mark. [L. S.]
Steh-shail, William, Skaiwhamish band, his x mark. [L. S.]
Kel-kahl-tsoot, Swinamish tribe, his x mark. [L. S.]
Pat-sen, Skagit tribe, his x mark. [L. S.]
Pat-teh-us, Noo-wha-ah sub-chief, his x mark. [L. S.]
S"hoolk-ka-nam, Lummi sub-chief, his x mark. [L. S.]
Ch-lok-suts, Lummi sub-chief, his x mark. [L. S.]

Executed in the presence of us –
M. T. Simmons, Indian agent.
C. H. Mason, Secretary of Washington Territory.
Benj. F. Shaw, Interpreter.
Chas. M. Hitchcock.
H. A. Goldsborough.
George Gibbs.
John H. Scranton.
Henry D. Cock.
S. S. Ford, jr.
Orrington Cushman.
Ellis Barnes.
R. S. Bailey.
S. M. Collins.
Lafayetee Balch.
E. S. Fowler.
J. H. Hall.
Rob''t Davis.

Executive Order

Lummi Reserve.

[In Tulalip Agency; occupied by Dwamish, Etakmur, Lummi, Snohomish, Sukwamish, and Swiwamish; treaty of January 22, 1855.]

EXECUTIVE MANSION, *November 22, 1873.*

It is hereby ordered that the following tract of country in Washington Territory be withdrawn from sale and set apart for the use and occupation of the Dwamish and other allied tribes of Indians, viz: Commencing at the eastern mouth of Lummi River; thence up said river to the point where it is intersected by the line between sections 7 and 8 of township 38 north, range 2 east of the Willamette meridian; thence due north on said section line to the township line between townships 38 and 39; thence west along said township line to the low-water mark on the shore of the Gulf of Georgia; then southerly and easterly along the said shore, with the meanders thereof, across the western mouth of Lummi River, and around Point Francis; thence northeasterly to the place of beginning; so much thereof as lies south of the west fork of the Lummi River being a part of the island already set apart by the second article of the treaty with the Dwamish and other allied tribes of Indians, made and concluded January 22, 1857. (Stats. at Large, vol. 12, p. 928.)

U. S. GRANT.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, KEITH E. MILNER and SHIRLEY A. MILNER, et. al, Defendants, THE LUMMI NATION, Intervenor-Plaintiff.	NO. CO1-0809R **DECLARATION OF DANIEL L. BOXBERGER**

I, Daniel L Boxberger, certify under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

1. I am over the age of 18 and competent to be a witness herein. I make this declaration concerning facts and events of my own personal knowledge.

2. I am a Professor of Anthropology at Western Washington University, and Chair of the Department of Anthropology at W.W.U. Attached hereto and incorporated herein as Attachment A is a true copy of my curriculum vitae.

3. I was hired by the Lummi Nation to investigate certain matters relating to this case. I have prepared a report which I understand has been furnished to the Defendants, and I have been deposed regarding that report.

4. As part of my research for this case, I obtained the entire file of the case, ***United States v. Stotts*** found in the National Archives and Records Administration, Pacific Northwest Region, located at Sand Point in Seattle, Washington. Attached hereto and incorporated herein as Attachment B is a true and correct copy of the records of that case that I located.

Signed and dated at Bellingham, Washington, on November 13, 2002.

/s/ Daniel L. Boxberger
Daniel L. Boxberger

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. LESLIE RAY STOTTS, R. F. BARNARD, P. F. NORMAN, H. W. DAWLEY, and all persons claiming an interest in the property herein described, Defendants.	No. 624-E IN EQUITY AMENDED BILL OF COMPLAINT

TO THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON:

Comes now the United States of America, by Anthony Savage, United States Attorney for the Western District of Washington, and David Spaulding, Assistant United States Attorney for said District, and presents this, its Bill in Equity, against the defendants above named, and in that behalf plaintiff complains and alleges as follows:

I.

The defendants, LESLIE RAY STOTTS, R. F. BARNARD, P. F. NORMAN, and H. W. DAWLEY,

have or claim an interest in the real property hereinafter described.

II.

The plaintiff in the year 1855, and for a long time prior thereto was seized and possessed of certain real property situated at, in and around what is known as the Gulf of Georgia, in what is now the Northern Division of the Western District of Washington, in Whatcom County, which said lands were then and for a long time prior thereto had been a part of the public domain of the United States.

On January 22, 1855, the plaintiff, acting by and through Isaac I. Stevens, Governor and Superintendent of Indian affairs, for the Washington Territory, entered into a treaty at Point Elliott, Puget Sound, with the chiefs, head-men and delegates of Dwamish, Suquamish and other allied tribes in said Washington Territory, which said treaty was reduced to writing; whereby in Article 2 thereof, said tracts of land should be set apart and as for as necessary surveyed and marked out for the exclusive use of said Indians. Thereafter for the purpose of defining and establishing the boundaries of the Indian reservation created by said treaty, the plaintiff, by President U. S. Grant, made its proclamation establishing said Lummi Indian Reservation pursuant to the terms of said treaty, to-wit:

"EXECUTIVE MANSION,
November 2, 1875.

"It is hereby ordered that the following tract of country in Washington Territory be withdrawn from sale and set apart for the use and occupation of the Dwamish and other allied tribes of Indians, viz: Commencing at the eastern mouth of Lummi River; thence up said river to the point where it is intersected by the line between sections 7 and 8 of township 38 north, range 8 east of the Williamette meridian; thence due/north on said section line to the township line between townships 38 and 39; thence west along said township line to the lowwater mark on the shore of the Gulf of Georgia; then southerly and easterly along the said shore, with the meanders thereof, across the western mouth of Lummi River, and around Point Francis; thence northeasterly to the place of beginning; so much thereof as lies south of the west fork of the Lummi River being a part of the island already set apart by the second article of the treaty with the Dwamish and other allied tribes of Indians, made and concluded January 22, 1857. (Stats. at Large, vol. 12, p. 928.)

U. S. Grant."

III.

That pursuant to the terms of said treaty and the Presidential Proclamation, and at all times thereafter

to the date of this complaint, the plaintiff has devoted the said lands and real property contained within the exterior boundaries of said Lummi Reservation to the exclusive use and occupation of the Lummi and other allied tribes entitled to occupy the same under the said treaty, and the said real property described within the said exterior boundaries of said reservation is and at all times mentioned in this complaint was an Indian Reservation and a part of the public domain of the United States, the title to which has ever been held in fee simple by the plaintiff for the use and benefit of said Indians, except as allotments have been made from time to time to individual Indians.

IV.

That on the 26th day of January, 1925, the State of Washington sold and conveyed the tide lands located in front of Lot 1, Section 5, Township 38 N., Range 1 E., to R. F. BARNARD: on January 26, 1925, the State of Washington sold and conveyed the tide lands in front of Lot 2, Section 5, Township 38 N., Range 1 E., to B. F. NORMAN; that on January 26, 1925, the State of Washington sold and conveyed the tide lands in front of Lots 3, 4, 5 and 6, Section 5, Township 38 N., Range 1 E., to LESLIE RAY STOTTS; that on January 26, 1925, the State of Washington sold and conveyed to LESLIE RAY STOTTS tide land in front of that part of Lot 1, Section 5, Township 38 N., Range 1 E., located south of the plat of Neptune Beach; that on January 27,

1925, the State of Washington sold and conveyed to H. W. DAWLEY, lands in front of the south 150 feet of Lot 2 of said Section 5, Township 38 N., Range 1 E.

V.

That all and singular the above described parcels of land lie within the exterior boundaries of the Lummi Indian Reservation as the same was established, defined and bounded by the said treaty and presidential proclamation, within the said division and district aforesaid, and are a part of the public domain of the United States.

VI.

That the said several deeds and contract, purporting and attempting to convey title to the defendants hereinafter mentioned to the lands mentioned and described therein cloud, encumber and injure the plaintiff's title and serve to continually and constantly annoy, harass and disturb the plaintiff in the quiet and peaceful enjoyment of said lands which it had set aside for the use and benefit of said Indians. That from time to time trespasses have been committed on said lands by the white defendants named herein, and others to the plaintiff unknown, and the outstanding purported, pretended and alleged title from the State of Washington operates as and furnishes an alleged and pretended justification to said defendants and others to continue to trespass on said lands and on said Indian Reservation.

VII.

That all, and singular, the purported, attempted and pretended conveyances of the State of Washington to said mentioned defendants, attempting and purporting to convey the said tide lands herein described are and were null and void and the State of Washington was without legal authority to enter into or make or execute the said conveyances or to sell or dispose of the said lands, and the said mentioned defendants, LESLIE RAY STOTTS, R. F. BARNARD, P. F. NORMAN, H. W. DAWLEY, acquired no legal or lawful right, title, interest or estate in or to said lands, and their said pretended and alleged claims of ownership and title constitute a cloud on plaintiff's title.

VIII.

That all and singular the lands described herein are vacant and unoccupied tide lands in the Gulf of Georgia, in the possession of the plaintiff and all within the boundaries of said Lummi Reservation.

That the uplands adjacent to the above described waterfront property has been heretofore alienated by the Indians and is at present owned in fee simple by citizens.

IX.

The plaintiff has no adequate remedy at law whereby its title to said Reservation may be quieted

and relieved of the pretended claims of the defendants and the several deeds and contract described herein canceled, set aside and decreed to be null and void; that the lands described in this complaint, title to which the plaintiff seeks to quiet and to remove encumbrances therefrom lie and are situated in Whatcom County, within the Northern Division of the Western District of the state of Washington and within the jurisdiction of this court. [This action is brought by the direction of the attorney general of the United States and by virtue of the authority received by the US atty for the western district of Washington from said attorney general. /s/ [Illegible] [illegible]]

PRAYER

IN CONSIDERATION WHEREOF and for inasmuch as the plaintiff is without full and adequate remedy in the premises, save in a court of equity, and to the end that the defendants, and each of them, may full, true and direct answer make to all and singular the matters and things herein set out, and may fully disclose and state their claims to the said land, and whatever right, title or interest they may have in and to the said lands described in this complaint, or to any part thereof, as fully as if they had been particularly interrogated thereunto, but not under oath (an answer under oath being hereby expressly waived), plaintiff now prays the Court that all and singular the several conveyances, deeds and other instruments purporting on their face to convey an interest in and to the lands described herein, to

the several defendants mentioned in this cause, be decreed to be null and void and of no legal effect, and that the said deeds, instruments and other conveyances purporting to convey or establish an interest in and to the above described lands be canceled, set aside and decreed to be null and void, and the several alleged owners of said lands named as defendants in this action be decreed to have no estate, right, title or interest in said lands.

Plaintiff further prays that its title be quieted as against the claims of each and every of the defendants named herein and all and singular as against the claims and demands of any person or persons whomsoever having or claiming to have an interest in and to said lands, and the plaintiff be decreed to be the owner of said lands as against all the world, subject to such right, title or interest as the plaintiff has created or has conveyed. And that plaintiff have such other and further relief as in equity may seem meet.

May it please Your Honor to grant unto the plaintiff a writ of subpoena of the United States of America, issued by and under the seal of this Honorable Court, directed to the defendants, and each of them, thereby commanding them, and each of them, at a certain time and under a certain penalty therein to be limited, to appear before this Honorable Court and then and there full, true and direct answers make to all and singular the premises, and stand to perform and abide by said order, direction and decree as may be made against them, or any of

them, in the premises as shall be meet and agreeable in equity.

/s/ Anthony Savage
United States Attorney

/s/ David Spaulding
Assistant United
States Attorney

UNITED STATES OF AMERICA)
WESTERN DISTRICT OF WASHINGTON) ss
NORTHERN DIVISION)

DAVID SPAULDING, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Washington, Northern Division, and as such makes this verification for and on behalf of the United States of America;

That he has read the foregoing [Amended]/Bill of Complaint, knows the contents thereof, and believes the same to be true.

/s/ David Spaulding

SUBSCRIBED and sworn to before me this 27th day of June, 1928.

/s/ [Illegible]
Deputy Clerk, United States
District Court, Western
District of Washington

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, KEITH E. MILNER and SHIRLEY A. MILNER, et. al, Defendants, THE LUMMI NATION, Intervenor-Plaintiff.	NO. CO1-0809R **DECLARATION OF RICHARD JEFFERSON**

I, Richard Jefferson, certify under penalty of perjury under the laws of the United States that the following statements are true and correct to the best of my knowledge:

1. I am an enrolled member of the Lummi Nation, and Director of the Planning Department for the Lummi Nation, Intervenor-Plaintiff in the above titled case. I am also a former member of the Lummi Indian Business Council, the governing body of the Lummi Nation. I am over the age of 18 and competent to be a witness herein. I make this declaration concerning facts and events of my own personal knowledge.

2. When Sandy Point was first developed, the Lummi Tribe entered into a lease with the Sandy Point Improvement Company, for the benefit of the waterfront owners at Sandy Point. A true and correct copy of that lease is attached as Exhibit 1. The lease gave the Sandy Point waterfront owners the right to place bulkheads, seawalls, rip-rap and other shore defense structures on the tidelands owned by the United States in trust for the Lummi Tribe. See lease paragraph 16.

3. The lease expired in 1988. The lessee held an option to renew the lease for an additional 25 years. See lease paragraph 14. After the Lummi Nation was informed that the Sandy Point Improvement Company was not intending to exercise its option to renew the lease and was also refusing to remove the shore defense structures from the tidelands, I became personally involved as a member of the Lummi Indian Business Council in the Tribe's extended efforts to negotiate a new lease with the Sandy Point waterfront property owners. I participated later as the Director of the Planning Department as well. The Tribe hoped to avoid the need to sue its neighbors to remove the trespassing structures.

4. The negotiations lasted longer than in the usual commercial or residential lease, for a number of reasons: (1) the sheer number of parties and attorneys involved in the negotiations, (2) tense relations between the Tribe and some of the Sandy Point owners, (3) the complexity of the legal issues surrounding ownership of the tidelands, and (4) the

harm that might accrue to the Sandy Point waterfront owners if the bulkheads were summarily removed. In addition, the very complicated question of a lease for the entrance to the artificial canal system at Sandy Point was being addressed by the negotiators at the same time. The Lummis tried to be patient, in the hopes that the Sandy Point owners would realize that it was in their best interests to negotiate rather than defend a lawsuit.

5. At all times during the negotiations, we made it clear that the Tribe was not simply going to go away, that the waterfront owners had to either agree to a lease, remove the bulkheads, or face a trespass lawsuit.

6. Despite our best efforts, we were not able to reach a negotiated solution with Defendants. It became clear to all concerned that until certain legal issues were resolved, the parties were not likely to reach an agreement on new lease terms. At that point the United States filed this lawsuit.

DATED this 14th day of November, 2002, at Bellingham, Washington.

/s/ Richard Jefferson
Richard Jefferson

U.S. DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

LEASE

Fee: $6.00 Allotment No. Lummi Tribal Tidelands
Lease No. 4577
Contract No. _____

Western Washington Indian Agency

THIS CONTRACT, made and entered into this 14th day of May, A.D. 1965, by and between the Indian or Indians named below (the Secretary of the Interior acting for and on behalf of the Indians) hereinafter called the "lessor," and Sandy Point ~~Community Co., Inc.~~ Improvement Co., FLK, a Washington corporation, of 518 – 1st Avenue North, Room 26, Seattle, Washington 98109, hereinafter called the "lessee" in accordance with the provisions of existing law and the regulations (25 CFR 131) which by reference are made a part hereof.

WITNESSETH, That for and in consideration of the rents, covenants, and agreements hereinafter provided, the lessor hereby lets and leases unto the lessee the land and premises described as follows, to wit: See attached "Exhibit A"

containing 3-400 acres, more or less, for the term to expire on March 31, 1988, subject to Provision 1, to be used only for the following purposes: resort,

recreational, boating, fishing and related moorage, and all aspects of these uses.

The lessee, in consideration of the foregoing, covenants and agrees, as rental for the land and premises, to pay:

TO –	DATE DUE	AMOUNT
Bureau of Indian Affairs,	5-1-65	$ 2,000.00
Western Washington	5-1-66	2,000.00
Agency for the LUMMI	5-1-67	2,000.00
TRIBE OF INDIANS	5-1-68	2,000.00
	5-1-69	2,000.00
	See Provision 7	

In the event of the death of any of the owners to whom, under the terms of this lease, rentals are to be paid direct, all rentals remaining due and payable shall be paid to the official of the Bureau of Indian Affairs having jurisdiction over the leased premises. This provision is applicable only while the leased premises are in trust or restricted status.

While the leased premises are in trust or restricted status, the Secretary may in his discretion, and upon notice to the lessee, suspend the direct rental payment provisions of this lease in which event the rentals shall be paid to the official of the Bureau of Indian Affairs having jurisdiction over the leased premises.

This lease is subject to the following provisions:

1. "SECRETARY" as used herein means the Secretary of the Interior or his authorized representative.

2. IMPROVEMENTS. – Unless otherwise provided herein it is understood and agreed that any buildings or other improvements placed upon the said land by the lessee become the property of the lessor upon termination or expiration of this lease.

3. UNLAWFUL CONDUCT. – The lessee agrees that he will not use or cause to be used any part of said premises for any unlawful conduct or purpose.

4. SUBLEASES AND ASSIGNMENTS. – Unless otherwise provided herein, a sublease, assignment or amendment of this lease may be made only with the approval of the Secretary and the written consent of all parties to this lease, including the surety or sureties.

5. INTEREST. – It is understood and agreed between the parties hereto that, if any installment of rental is not paid within 30 days after becoming due, interest at the rate of 6 percent per annum will become due and payable from the date such rental became due and will run until said rental is paid.

6. RELINQUISHMENT OF SUPERVISION BY THE SECRETARY. – Nothing contained in this lease shall operate to delay or prevent a termination of Federal trust responsibilities with respect to the land by the issuance of a fee patent or otherwise during

the term of the lease; however, such termination shall not serve to abrogate the lease. The owners of the land and the lessee and his surety or sureties shall be notified by the Secretary of any such change in the status of the land.

7. RENTAL ADJUSTMENT. – The rental provisions in all leases which are granted for a term of more than five years and which are not based primarily on percentages of income produced by the land shall be subject to review and adjustment by the Secretary at not less than five-year intervals in accordance with the regulations in 25 CFR 131. Such review shall give consideration to the economic conditions at the time, exclusive of improvement or development required by this contract or the contribution value of such improvements.

8. INTEREST OF MEMBER OF CONGRESS. – No Member of, or Delegate to, Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this provision shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

9. VIOLATIONS OF LEASE. – It is understood and agreed that violations of this lease shall be acted upon in accordance with the regulations in 25 CFR 131.

10. ASSENT NOT WAIVER OF FUTURE BREACH OF COVENANTS. – No assent, express or implied, to any breach of any of the lessee's covenants,

shall be deemed to be a waiver of any succeeding breach of any covenants.

11. UPON WHOM BINDING. – It is understood and agreed that the covenants and agreements hereinbefore mentioned shall extend to and be binding upon the heirs, assigns, successors, executors, and administrators of the parties of this lease. While the leased premises are in trust or restricted status, all of the lessee's obligations under this lease, and the obligations of its sureties, are to the United States as well as to the owner of the land.

12. APPROVAL. – It is further understood and agreed between the parties hereto that this lease shall be valid and *binding only* after approval by the Secretary.

13. ADDITIONS. – Prior to execution of this lease, provision(s) number(s) 14, 15, 16, 17 and 18 ~~has~~ (have) been added hereto and reference ~~is~~ (are) made a part hereof.

14. This lease may be renewed at the option of the Lessee for a further term of not to exceed twenty-five (25) years, commencing at the expiration of the original term, upon the same conditions and terms as in effect at the expiration of the original term, provided that notice of the exercise of such option shall be given by the Lessee to the Lessor and the Superintendent in writing at least twelve (12) months prior to said expiration of original term.

15. The purpose of this lease is for boating, fishing and recreational, and moorage, repair and all uses related to these purposes. The Lummi Indian Tribe reserves access rights over said tidelands.

16. It is understood that the Lessee has the right to alter or fill portions of the tidelands not to exceed 100 feet seawardly from the present bank.

17. It is understood and agreed that this lease is subject to Lease No. 4154, in favor of the Bellingham Marine, Inc. covering a 200-foot passageway.

18. No payments made under this lease will be refunded because of title defects and the Lessor and the Secretary do not warrant title to the leased premises.

Sandy Point Community Co., Inc. Lease

Lummi tribal tidelands immediately adjacent to and fronting upon the following described lands in Whatcom County, State of Washington:

Government Lots 1, 2, 3, 4, sec. 8.

Government Lots 5 and 6, sec. 9.

Government Lots 1, sec. 17.

Government Lots 1, sec. 16.

All in T. 38 N., R. 1E., Willamette Meridian, Washington.

The tidelands described in this lease shall not exceed beyond 660 feet seawardly from the present bank.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands on 14th day of May, 1965.

Witnesses (two to each signature):

SANDY POINT ~~COMMUNITY CO., Inc.~~ IMPROVEMENT CO.

By /s/ R.E. Rogers
President

P.O. _____

Lessee

ATTEST: Robert R. Walker
Assistant Secretary
Sandy Point
Improvement Co.

P.O. _____

987399

Lessee

ATTEST: _____

LUMMI INDIAN TRIBE

P.O. Vernon Lane
~~Secretary~~, Lummi
Tribal Council
Acting Sec.

By /s/ Forrest L. Kinley

Lessor

_____

Lummi Tribal Council

P.O. _____

Lessor

STATE OF WASHINGTON)
: SS
COUNTY OF SNOHOMISH)

On this day personally appeared before me Forrest Kinley, Chairman of the Lummi Tribal Council, to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 14th day of May, 1965.

/s/ H.E. Isenhart
NOTARY PUBLIC in and for the State of Washington, residing at Everett

STATE OF WASHINGTON)
: SS
COUNTY OF [ILLEGIBLE])

On this day personally appeared before me R. E. Rogers and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

P.O. _____

GIVEN under my hand and official seal this 14th day of May, 1965.

/s/ H.E. Isenhart
NOTARY PUBLIC in and for the State of Washington, residing at Everett

Approved MAY 17 1965 /s/ George M. Felshaw
Superintendent

Approving Official.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, KEITH E MILNER and SHIRLEY A MILNER, et. al, Defendants, THE LUMMI NATION, Intervenor-Plaintiff	NO CO1-0809R **SECOND DECLARATION OF DANIEL L. BOXBERGER** **(Noted for hearing November 22, 2002)**

I, Daniel L Boxberger, certify under penalty of perjury under the laws of the State of Washington that the following statements are true and correct

1. I am over the age of 18 and competent to be a witness herein. I make this declaration concerning facts and events of my own personal knowledge

2 I am a Professor of Anthropology at Western Washington University, and Chair of the Department of Anthropology at W.W.U Attached hereto and incorporated herein as Attachment A is a true copy of my curriculum vitae.

3 I was hired by the Lummi Nation to investigate certain matters relating to this case. I have prepared a report which I understand has been

furnished to the Defendants, and I have been deposed regarding that report A copy of that report is appended and incorporated herein as Attachment B

4 As stated in my report, the Lummi Indians in the nineteenth century understood the demarcation between uplands and tidelands to be the line of vegetation. When the federal government had the Lummi Reservation surveyed in the 1870's and 1880's for the purpose of allotting the arable lands of the Reservation, the line of vegetation would have been understood by the Indians to be the boundary between the individually owned uplands and the tidelands that were to be held for the common use of all tribal members

Signed and dated at Bellingham, Washington, on November 15, 2002

/s/ Daniel L. Boxberger
Daniel L. Boxberger

App. 40

The Importance of Tidelands to the Lummi Indians

and

The Understanding of the Lummi Indians of the Surveys of Land Assignments and Tidelands on the Lummi Indian Reservation

Prepared for the Office of the Reservation Attorney
Lummi Indian Reservation

by

Daniel L. Boxberger, Ph.D.
Bellingham, Washington

February 2002

* * *

II. Question 1

1. What was the importance of tidelands to the Lummi Indians at and around the time of the Treaty of Point Elliott and at the time the assignment of lands were made on the Lummi Indian Reservation?

From time immemorial the Lummi have been a people of the seacoast. The dependence upon maritime resources has been indicative of the Lummi way of life from prehistoric times to the present. This dependence was recognized by the federal government of the United States. In Article 5 of the Treaty of Point Elliott the U.S. Government and the Lummi agreed that:

> The right of taking fish at all usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked and cultivated by citizens.

The dependence of the Lummi on the resources of the tidelands has been recorded in the ethnographic database, most notably by Stern (1934) and Suttles (1951). They both emphasize the importance of the shoreline to the Lummi. The shore is the area between the sea and the land. Symbolically the shore

is the mid-point in the life of a person. The preferred place for a child to be born was on the beach. When a person dies they are laid to rest in the forest. The shore is where people pull up their canoes and where they build their homes. Homes were built above the high water mark on sand or gravel where support posts could be dug into the ground, where there was drainage and where they were protected from the cold northeast wind. Summer homes were built on rocky shores facing the sun, preferably where the warm wind blows so that it will help dry the fish taken at reef net locations. Several homes composed a village. Canoes were usually left just above the high water mark so that they could easily be launched when needed.

In front of the villages were sandy or gravel beaches and often below the beaches were mud flats uncovered at low tide. In the gravel there were butter clams, steamer clams, and horse clams. On the mud flats cockles lie just below the surface and beds of mussels are found. Further out on the tide flats are beds of eelgrass where flounders can be speared when the tide is low. Herring lay their eggs on the eelgrass and the Lummi would gather the herring spawn for food. Crabs could be taken at low tide by wading. At the upper end of the beach the Lummi would dig pits to steam shellfish. First a fire would be built, then seaweed laid over the hot rocks, then shellfish, then more seaweed, and then covered over and allowed to cook. This was an important method for cooking large amounts of shellfish for preservation as well as the

center of important social events. Ducks swim over the beds of eelgrass and into the deeper water. Eelgrass is used for tying on the reef nets. In some places a path could be cut through the eelgrass to guide the salmon into the nets. Beyond the low tide was where the reef nets were set. Reef nets took sockeye salmon, the mainstay of the Lummi economy (Boxberger 2000:13).

On rocky shores other types of resources were found in the intertidal zone. Sea urchins, abalone and oysters were gathered from these locations. Beyond low tide rock fish and ling cod could be lured to the surface to be speared, or taken with a hook and line.

Above the beach, beyond the reach of the tide, camas, wild onions and other plant foods grow. By the early 1800s the Lummi were planting potatoes in the beach prairies, an indication that agriculture was a well understood concept by the time the treaties were negotiated. It is also an indication that the Lummi valued agriculture as an addition to their standard of living by treaty time. In some places there are salt marshes where cattail and tule are harvested to make into mats for bedding and floor coverings. Beyond the beach prairies and salt marshes lie the forest where red cedar provided planks for their homes, logs for canoes, and cedar bark for clothing and baskets.

Exclusive or primary "ownership" of certain sites existed, but it was not the formal or typical way in which resources were accessed or exploited. Some

locations, such as reef net sites, were said to be owned by individuals. However, the owner was expected to hold the site in trust for a larger kin group. Thus, the Lummi understood the concept of ownership of particular properties, but mostly the ownership of resource locations was impractical and uncommon. There is a singular instance of a clam bed on Lopez Island being in the control of an extended kin group, but in almost all cases the tidelands were used in common by the Lummi tribe.

Based on these facts, it is likely that the concepts of family ownership of upland tracts and common ownership of the beaches and tidelands could have been conveyed to and understood by the Lummi during the treaty-making process. Just as the Lummis were adamant about maintaining their historic access to off reservation fisheries in the treaty negotiations, it is likely that they would also have been adamant about preserving the common use of the reservation tidelands. This is especially likely given the role of the beaches in the daily lives of every 19th century Lummi, and the fact that many of the treaty assignments would inevitably be located away from the beach. It is difficult to conceive of treaty time Lummis agreeing to forego access to and use of the beaches, or to make their access and use dependent upon permission from other persons, even other members of the tribe.

The culture of the Lummi can be seen as centered on the beach where every part of their livelihood was found. The beach was part of a transition from the

sea to the forest. Like the life of an individual is a transition from infancy to old age, Nature is a transition from the sea to the land. Nature is a source of supernatural powers and food is a gift of the supernaturals. Nature is exploited by the intensive use of specific resources at specific times of the year. From the winter villages to shellfish gathering locations, to reef net sites, to root crops, the Lummi seasonally depended upon localized resources that were consumed fresh and preserved for use year-round. The beaches were the thoroughfare of access. Although, salmon played a major role in the subsistence economy of the Lummi, the importance of other resources cannot be dismissed. Shellfish especially were an important resource for the Lummi, as were other littoral resources. While modified by economic and political exigencies this dependence continues into the present.

Prior to 1860 the Lummi lived in about nineteen villages between Point Roberts and Lopez Island. Three of these villages were located on what was to become the Lummi Indian Reservation. By the Treaty of Point Elliott the Lummi agreed to move onto the reservation and establish their permanent homes there.

Indian reservations were intended to be a base from which the northwest Indians would continue to rely on the resources of their traditional territories. Recognizing that the Indians were dependent upon resources off the reservation and that they would not give up that dependence in the treaties, the federal government agreed that the Indians would be able to

leave the reservation for the purposes of fishing, hunting and gathering. This was made explicit at the treaty negotiations. The reservation was to be the place where the Lummi built their homes, but the Lummi also expected to be able to travel off-reservation to access other resource sites. Article 5 of the Treaty of Point Elliott (quoted above) stipulates the right to erect shelters off-reservation to preserve resources. This would have typically been on the beach.

The Lummi Reservation was ideally located for these purposes. It provided access to the fishing locations of the San Juan archipelago and northward to Point Roberts. It is located at the mouth of the Nooksack River, an important salmon stream. And it was composed mostly of low bank shoreline which provided building locations and access to the sea shore.

The sea shore of the Lummi Indian Reservation is essential for four main reasons: it provides access to the main means of water transportation; it provides means of access to salmon fisheries; it provides access to intertidal resources; and it is a place of gathering for social activities.

Intertidal resources are gathered in a number of locations on the reservation. Shellfish, in particular, are harvested at Brant Island in Lummi Bay, near Portage, Gooseberry Point and Sandy Point. Sandy Point was a place where Lummis gathered butter clams (*Saxidomus giganteus*). Aloysius Charles

(1898-1983) a respected tribal historian, spoke of the importance of Sandy Point during spring tides. He told of how sometimes in the spring when the *stee-whit* (west wind) blew, it would create strong wave action on Sandy Point. This wave action would wash the butter clams loose and the Lummi could gather them in abundance, preserving large numbers.

In summary, the reservation tidelands were of vital importance to the welfare of the Lummi tribe as a whole at treaty time. The tidelands provided access to resources both within the tidelands and, via canoe, in other locations where the Lummi reserved fishing and gathering rights. The tidelands were socially, economically and culturally important to the manner in which the Lummi viewed themselves and the world around them. They would not have relinquished the common use of the reservation tidelands to individuals or families when they entered into the treaty.

* * *

Judge Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, v. KEITH E MILNER AND SHIRLEY A MILNER, Defendants.	NO. C01-0809R DECLARATION OF JAMES JOHANNESSEN
UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, v. MARY D. SHARP, Defendant.	
UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, v. BRENT C. NICHOLSON AND MARY K. NICHOLSON, Defendants.	

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation,
Plaintiff,
v.
HARRY F. CASE,
Defendant.

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation,
Plaintiff,
v.
IAN C. BENNETT AND MARCIA A. BOYD,
Defendants.

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation,
Plaintiff,
v.
DONALD C. WALKER AND GLORIA WALKER,
Defendants.

THE LUMMI NATION,
Intervenor-Plaintiff.

DECLARATION OF JAMES JOHANNESSEN

I, JAMES JOHANNESSEN, do declare and say:

1. I am a coastal geomorphologist specializing in applied coastal research and science-based coastal management. I have been employed as a coastal geomorphologist since 1985. A true and correct copy of my curriculum vitate is attached hereto and marked as Exhibit A, which further summarizes my experience.

2. I have been asked by the Assistant United States Attorney who represents the federal government in this case to prepare a declaration which discusses the environmental impacts of the riprap and bulkhead which fronts the property of Brent and Mary Nicholson.

3. The riprap fronting the bulkhead at the Brent and Mary Nicholson property, located on the southern portion of the west shore of Sandy Point on the Lummi Indian reservation, is negatively impacting the Lummi owned tidelands in terms of beach stability and nearshore habitats. The large volume of riprap that is present at the property extends down to the mid to lower foreshore (steeper upper and mid portions of the intertidal beach), with large boulders on the beach scattered between +2.5 and +6.0 ft Mean Lower Low Water (MLLW).

4. The presence of bulkheads has been documented to accelerate beach erosion as beach sediment directly waterward of this type of structure is

entrained by increased reflectivity and increased hydraulic turbulence (Macdonald at al., 1994, Miles et al., 2001). A bulkhead with reflective character acts to reflect incoming wave energy back out across the beach (Plant and Griggs 1992). Much of the energy of incoming waves is transferred back waterward (as rapid backwash), which transports the mobilized beach sediment offshore into bars or alongshore at an accelerated transport rate (Miles et al 1997). The effect of bulkheads should be contrasted against a dissipative sand and gravel backshore/"storm berm."

5. Beaches waterward of an intertidal bulkhead/ revetment also tend to experience a higher degree of bulkhead-induced impacts than do beaches waterward of a bulkhead that is located landward of Mean Higher High Water (MHHW) (Canning and Shipman 1995, Shipman 1998, Spalding et al 2001, Nordstrom 1992). The toe of the dense riprap revetment at the Nicholson property, as surveyed in May 2004 by Pacific Survey and Engineering, extends waterward to approximately elevations +5.5 to +6.25 ft MLLW. This is generally 2.0 to 2.5 ft vertically below local MHHW (+8.32 ft MLLW). Virtually the entire rock revetment is located waterward of Mean High Water (MHW) and MHHW. The dense riprap revetment is stacked at a very steep angle at the Nicholson property, and the boulders are very angular, such that the riprap has a moderately reflective waterward face. Wave reflection at the property has very likely removed beach sediment from the foreshore, leading to a lower beach profile that would be present without the riprap at

the Nicholson property. Bulkhead induced turbulence appears to have caused the foreshore to be artificially steep fronting the Nicholson property, creating an artificially narrow foreshore.

6. The presence of a bulkhead or steep riprap revetment on the upper intertidal tends to cause a selective winnowing of beach sediment, with fines (sand) selectively removed from the foreshore waterward of the bulkhead (Thom et al 1994). This is due to increased wave energy immediately waterward of the bulkhead as well as increased littoral drift (longshore transport) rates (Miles 2001). Fine sediment is removed from the area waterward of the bulkhead and deposited further waterward or transported away from the site.

7. When fines are removed from the upper intertidal beach due to bulkhead-induced impacts, the beach is converted to a gravel beach, as is likely the case at southern Sandy Point (MacDonald et al 1994). A gravel beach does not provide the same quality of habitat as a finer grain beach (Thom et al 1994). This leads to a direct loss of nearshore habitats due to reduction in area of habitat patches. Habitats of particular value to the local nearshore system that may have been present at the subject property include forage fish (such as surf smelt) spawning habitat. These habitat areas are only found in the upper intertidal portion of fine gravel and sand beaches, with a high percentage of 1-7 mm sediment (Pentilla 1978). Beach sediment coarsening also can affect hardshell clam habitat, by decreasing or locally

eliminating habitat. This may very well have occurred at the Nicholson property, but no accurate pre-development data is known to exist.

8. In general terms, when erosion occurs at a bulkheaded site for whatever reason, the intertidal area is decreased (Shipman 1998, Douglass and Pickel 1999) and intertidal habitat area is lost. This is the case at the Nicholson property where the beach above the +3 ft MLLW contour is partially covered by large boulders and the beach above the +5.5 to +6.25 ft MLWW contour is completely covered with large boulders. For comparison, the unbulkheaded shore that is nearest to the Nicholson site, located approximately 27 lots to the north, the beach and backshore area extended (as surveyed in January 2002 by Pacific Surveying and Engineering) approximately 73 ft landward of the elevation corresponding to the bulkhead toe at Nicholson property (+6.0 ft MLLW).

9. Studies in other locations have quantitatively documented a decrease in meiofaunal abundance in upper beach sediment waterward of a bulkhead (Spalding and Jackson 2001). This may also be the case at the Lummi tidelands waterward of the Nicholson property.

10. In conclusion, the large riprap revetment at the Nicholson property discussed herein, impart negative physical and ecological impacts to the nearshore system habitats it contains.

11. A list of references which I have relied on in support of the foregoing is as follows:

Canning, Douglas J. and Hugh Shipman, 1994, Coastal Erosion Management Studies in Puget Sound, Washington: Executive Summary, *Coastal Erosion Management Studies Volume I*, Shorelands and Water Resources Program, Washington Department of Ecology, Olympia.

Douglass, Scott, and Pickel, Bradley, 1999, The Tide Doesn't Go Out Anymore – The Effects Of Bulkheads On Urban Bay Shorelines, *Shore and Beach*, v. 67, n. 2&3, p. 19-25.

Macdonald, Keith, Simpson, David, Paulsen, Bradley, Cox, Jack, and Gendron, Jane, 1994, *Shoreline armoring effects on physical coastal processes in Puget Sound, Washington*: Coastal Erosion Management Studies, Volume 5, Shorelands Program, Washington Dept. of Ecology, Olympia, DOE Report 94-78.

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Nordstrom, K.F., 1992, *Estuarine Beaches*, New York: Elsevier, 225p.

Pentilla, Dan, 1978, Studies of Surf Smelt (Hypomesus pretiosus) in Puget Sound. WA Dept. of Fisheries, Technical Report No. 42, 47 p.

Plant, N.G. and Griggs, G.B., 1992, Interactions between nearshore processes and beach morphology near a seawall. *Journal of Coastal Research*. 8, 183-200.

Shipman, Hugh, 1998, *Shoreline change at North Beach, Samish Island*, Shorelands and Environmental Assistance Program, WA Dept. of Ecology, Pub. No. 98-101, Olympia, 44p.

Spalding, V.I., and Nancy L. Jackson, 2001, Field Investigation of the Influence of bulkheads on Meiofaunal Abundance in the Foreshore of an Estuarine Sand Beach, *Journal of Coastal Research*, v. 17, no. 2, p. 363-370.

Thom, R.M., Shreffler, D.K., and MacDonald, K., 1994, Shoreline Armoring Effects on Coastal Ecology and Biological Resources in Puget Sound, Washington, *Coastal Erosion management Studies*, v. 7, Report 94-80, Shorelands and Coastal Management Program, Washington.

I declare under penalty of perjury that the foregoing is true and correct.

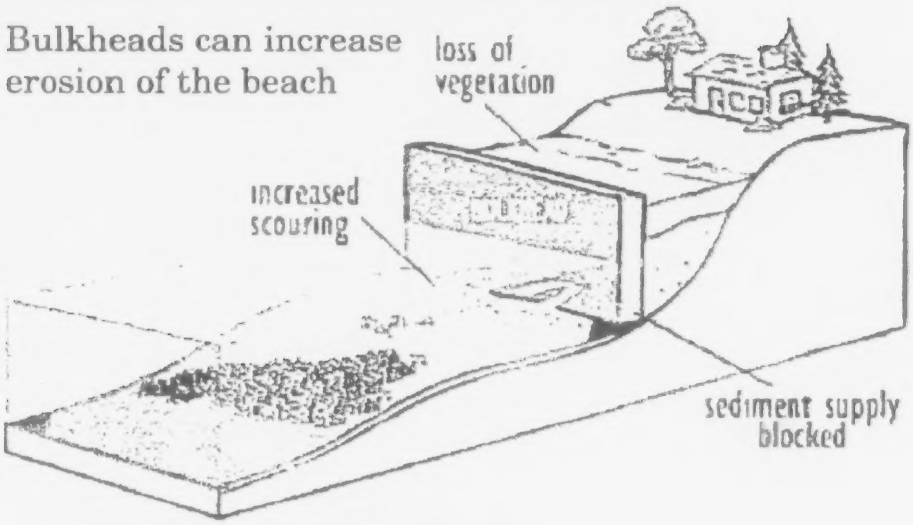
Executed this [illegible] day of [illegible], 2004 at Bellingham, Washington.

/s/ [illegible]
JAMES JOHANNESSEN

Department of Ecology

Puget Sound Shorelines

Bulkheads Can Change The Beach



☐ **Increased Beach Erosion**

When waves reflect off shoreline armoring structures, particularly concrete bulkheads, they can scour away sediments and increase erosion.

☐ **Loss of Sand**

In time, a sandy beach can be transformed into gravel or cobbles – and may even be scoured down to bedrock, or more commonly in Puget Sound, a hard clay. The footings of bulkheads may also be exposed, leading to undermining and failure.

☐ **Loss of Surrounding Beaches**

Where long stretches of shore are lined with bulkheads and other hard armoring, beaches composed of fine sediments can erode down to gravel, cobble, or hardpan within a few decades.

☐ **Loss of Sediment**

Bulkheads can shut off the supply of sand and gravel to the beach, resulting in beach loss and the gradual loss of finer sediment.

☐ **Loss of Plants**

When bulkheads are built, overhanging trees and shrubs are often removed. This can cause increased siltation, reduced organic matter, and changes in nearshore marine habitat.

☐ **Loss of Shade**

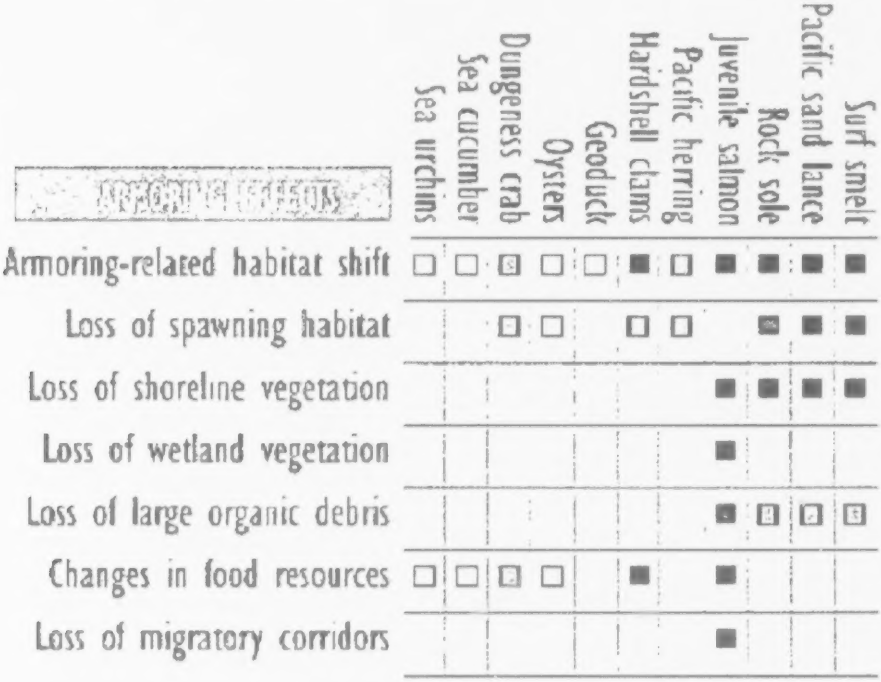
The loss of bank vegetation reduces shade and shelter on the upper beach. As a result, spawning habitat for forage fish (such as surf smelt) may be degraded.

☐ **Loss of Habitat**

Bulkheads and other armoring devices can degrade the nearshore habitats that provide food for many benthic feeding fish, including salmon. In addition, spawning areas for surf smelt, sand lance, and herring may be lost due to removal of fine sediments from the intertidal zone.

Armoring Effects on Species

Bulkheads and other armoring devices can change important shoreline habitats. Shoreline areas used by fish, shellfish, birds, marine mammals, and other marine life may be damaged.



KEY

■ Well documented evidence of negative effects.

▨ High potential for negative effects but not documented.

□ Some potential for long term effects but not documented.

Source: Shoreline Armoring Effects on Coastal Ecology and Biological Resources in Puget Sound

App. 59

Washington Coastal Erosion Management Studies, Volume 7. Washington State Department of Ecology August 1994

No. 09-820

In the Supreme Court of the United States

MARY D. SHARP, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The boundary between petitioner's upland property and the tidelands is the mean high water line (MHWL), which moves over time. That line is also where the navigable waters of the United States begin. See 33 C.F.R. 329.12(a). Petitioner maintains shore defense structures that are seaward of the MHWL. The questions presented are as follows:

1. Whether, in an action for trespass brought against petitioner by the United States on behalf of the Lummi Nation, petitioner may escape liability on the ground that the State of Washington owns the tidelands.

2. Whether the court of appeals correctly concluded that petitioner's maintenance of shore defense structures seaward of the MHWL constitutes a trespass.

3. Whether the Rivers and Harbors Appropriation Act of 1899, ch. 425, § 10, 30 Stat. 1151 (33 U.S.C. 403), and the Army Corps of Engineers' implementing regulations prohibit maintenance of structures within the navigable waters of the United States without authorization from the Corps.

4. Whether the court of appeals correctly upheld the district court's injunction requiring the removal of shore defense structures seaward of the MHWL.

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In the Supreme Court of the United States

No. 09-820

MARY D. SHARP, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-45) is reported at 583 F.3d 1174. The orders of the district court (Pet. App. 46-47, 48-49, 50-63, 64-71, 72-75, 76-83, 84-92, 93-101, 102-108) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2009. The petition for a writ of certiorari was filed on January 7, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed suit to obtain injunctive relief against petitioner and neighboring coastal homeowners (collectively the Homeowners) who maintain shore defense structures encroaching onto tidelands—lands be-

low the mean high water line (MHWL)—that are owned by the United States and held in trust for the Lummi Nation. The district court held that the Homeowners are liable for common-law trespass and for maintaining obstructions within navigable waters of the United States, in violation of Section 10 of the Rivers and Harbors Appropriation Act of 1899 (1899 RHA), ch. 425, 30 Stat. 1151 (33 U.S.C. 403). Pet. App. 52-62. The court ordered the Homeowners to "remove all rock, riprap, and other shore defense structures that are located seaward of MHW[L]" as determined by a 2002 survey. *Id.* at 62. The court of appeals affirmed in relevant part. *Id.* at 1-45.

1. In 1855, the United States and several Indian Tribes signed the Treaty Between the United States and the Dwámish, Suquámish, and other allied and subordinate Tribes of Indians in Washington Territory, Jan. 22, 1855, 12 Stat. 927 (Treaty of Point Elliot). Under that treaty the Tribes relinquished claims to lands within the Territory of Washington in exchange for, *inter alia*, specified tribal reservations, including a reservation for the Lummi Nation on an "island" in a river delta. Pet. App. 4. Article VII of the Treaty gave the President discretion to "remove" the Tribes to "other suitable place[s] within [the] Territory." Art. VII, 12 Stat. 929; Pet. App. 16. In 1873, President Grant issued an Executive Order expanding the Lummi Indian Reservation to adjoining areas, including Sandy Point, a peninsula that extends into the Strait of Georgia, which connects to the Pacific Ocean. *Id.* at 5. The President's order described the additional reserved lands as extending to "the low-water mark on the shore of the Gulf of Georgia," *ibid.*, reflecting the Lummi's historic use of tidelands for fishing and harvesting shellfish. *Id.* at 18.

After the reservation was created, upland areas on Sandy Point were divided into lots and patented to individual tribal members. Pet. App. 5. The tidelands, however, were never allotted or conveyed. In 1963, the Lummi Nation, with approval of the Bureau of Indian Affairs (an agency within the United States Department of the Interior), leased the tidelands surrounding Sandy Point to the Sandy Point Improvement Company to facilitate development of the uplands. *Id.* at 6, 15; see 25 U.S.C. 415(a) (governing leasing of Indian lands). The lease expired in 1988, when the lessee declined to exercise an option for renewal. Pet. App. 6.

The Homeowners own parcels derived from the original upland patents. Pet. App. 5. Over the years, the Homeowners have sought to protect their homes from storm surges and beach erosion by erecting and maintaining shore defense structures consisting of sea walls and riprap (large boulders placed seaward of the sea walls to dissipate the force of the waves). When petitioner purchased her home in 1980, there was an existing wooden bulkhead on the property. Pet. 5-6. Petitioner placed riprap seaward of the bulkhead in 1983 and 1993, without conducting a survey to determine the MHWL and tideland boundary. *Ibid.*; Appellee's Supp. E.R. Doc. 102 (Decl. of James Sharp).

2. Congress enacted the 1899 RHA to regulate navigable waters, which "are to be deemed the 'public property of the nation.'" *Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191, 201 (1967) (citation omitted). Section 10 of the 1899 RHA provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the

> building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. 403.

The Army Corps of Engineers (Corps) has promulgated regulations to implement its authority under this provision. Those regulations require a permit for any "structures and/or work in or affecting navigable waters of the United States." 33 C.F.R. 322.3. The term "[n]avigable waters" encompasses, *inter alia*, "those waters that are subject to the ebb and flow of the tide." 33 C.F.R. 329.4. In coastal waters such as those at issue in this case, the "[s]horeward limit" of the Corps' Section 403 jurisdiction "extends to the line on the shore reached by the plane of the mean * * * high water." 33 C.F.R. 329.12(a)(2). The Corps' regulations also define "structure" to include a "breakwater, bulkhead * * * [or] riprap." 33 C.F.R. 322.2(b).

3. The Seattle District of the Corps sent letters to the Homeowners requesting removal of shore defense

structures determined to be seaward of the MHWL and on Lummi tidelands. Pet. App. 7. The United States Attorney subsequently sent similar letters. *Ibid.* After the Homeowners refused to remove the structures, the United States initiated the present action for injunctive relief under federal common law (for trespass) and under the 1899 RHA. *Ibid.* In 2002, the United States commissioned a topographic survey to establish the MHWL on the relevant properties. The survey demonstrated that the Homeowners' shore defense structures are all located at least in part seaward of the MHWL. *Id.* at 6, 11.

4. The district court resolved the trespass and 1899 RHA claims through a series of orders on summary judgment. In one order, the district court determined that the United States held title to the tidelands as trustee for the Lummi Nation (rejecting the Homeowners' contention that the State of Washington held title) and that the property boundary was the MHWL. Pet. App. 93-101. In another order, the court held that petitioner and the other Homeowners were liable for trespass onto the Lummi tidelands. *Id.* at 52-56. The court based that conclusion on the undisputed evidence that the shore defense structures are located, in part, on the tidelands, and on the Homeowners' undisputed refusal to remove the encroachments in response to the United States' demand. See *ibid.*

For purposes of summary judgment, the district court assumed that the structures were landward of the MHWL at the time of their construction. Pet. App. 65. The court determined, however, that this fact, if proved, would not relieve the Homeowners of liability, given the structures' present location seaward of the MHWL. *Id.* at 54-56. The court similarly concluded that the Homeowners were liable under the 1899 RHA for maintaining

structures within the navigable waters of the United States without a permit from the Corps. *Id.* at 56-58.

After finding liability, the district court determined that injunctive relief was available for "both the trespass and the [1899] RHA violation[s]." Pet. App. 59. The court directed petitioner and the other Homeowners to: (1) "promptly remove all rock, riprap, and other shore defense structures that are located seaward of MHW[L] as that line is determined on the * * * 2002 survey" and (2) at "the request of the government," to "promptly * * * remove all rock, riprap, and other shore defense structures that become located seaward of MHW[L]," "[a]s MHW[L] moves up and down the shore," and "as * * * determined by subsequent surveys." *Id.* at 62.

6. The court of appeals affirmed in relevant part. Pet. App. 1-45. The court concluded that the Homeowners were not prohibited from asserting the State of Washington's purported title in the tidelands as a defense to the trespass action. *Id.* at 12 n.7. It rejected that defense on the merits, however, concluding that the 1873 Executive Order's reservation of lands "to the low-water mark" was sufficient to rebut the presumption of state title under the "equal footing" doctrine. *Id.* at 15-18.

The court of appeals concluded that, as a matter of federal common law, the boundary between tidelands and uplands is "ambulatory," and that the Homeowners had no right to "fix the property boundary" or to utilize the United States' property (held in trust for the Lummi Nation) to protect their own. Pet. App. 20; *id.* at 19-28. The court stated that upland and tideland owners possess their respective properties under a "reciprocal" arrangement, whereby "any loss experienced by one" as a result of accretion or erosion "is a gain made by the other." *Id.* at 22-23. The court concluded that it would be "inher-

ently unfair to the tideland owner to privilege the forces of accretion over those of erosion." *Id.* at 23.

The court of appeals also concluded that the Homeowners' maintenance of unpermitted shore defense structures seaward of the MHWL violated the 1899 RHA, even assuming those structures were originally built on uplands and came to encroach upon "navigable waters" as a result of "the movement of the tidal boundary." Pet. App. 32; see *id.* at 30-36. The court observed that the Homeowners' shore defense structures "obviously qualify as a 'breakwater, bulkhead, . . . or other structure'" under the second clause of 33 U.S.C. 403, Pet. App. 33, and that they "modify the course, location, condition, and capacity of the Strait [of Georgia] under clause three" because they "prevent[] the Strait from advancing landward." *Id.* at 33, 35. The court also observed that interpreting Section 403 to apply to structures maintained within navigable waters was consistent with the Corps' longstanding interpretation and furthered the statute's purpose of "insuring that navigable waterways remain free of obstruction." *Id.* at 31. Having affirmed the district court's conclusion that the Homeowners' maintenance of shore defense structures seaward of the MHWL effected both a trespass and a violation of the 1899 RHA, the court of appeals affirmed the injunction directing the structures' removal. *Id.* at 36.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the courts below found that the only relief ordered against petitioner—an injunction directing removal of her shore defense structures seaward of the MHWL—was an appropriate remedy for both the

trespass and the 1899 RHA violation. To prevail, petitioner therefore must demonstrate that the United States was not entitled to an injunction on either basis. Petitioner cannot surmount either hurdle, much less both.

1. Petitioner argues (Pet. 33-40) that she should not have been held liable for trespass in this action because the State of Washington, not the United States, has proper title to the tidelands. This case is an unsuitable vehicle to decide the question of ownership, and petitioner's contention lacks merit in any event.

a. It would be inappropriate for the Court to decide the question of ownership in this case because the State of Washington is not a party. In fact, Washington previously declined petitioner's invitation to join this litigation on the ground that its chance of establishing title in the tidelands was "remote at best." Appellees' Supp. E.R. Doc. 133, at 27. The State, not a single landowner in Washington, is the appropriate party to advance its sovereign interests in this Court.

b. Washington's absence from the case also results in a threshold legal defect. In a trespass action, "[t]itle in a third person may not be alleged by a defendant who is not in privity of title with the third person." 75 Am. Jur. 2d *Trespass* § 62 (2007). Because petitioner does not claim to be in privity with the State of Washington, she may not assert its title to the tidelands as a defense here.

Given petitioner's lack of privity with the State, the court of appeals erred in considering petitioner's Washington-title defense on the merits. The court found the issue to be properly before it on the ground that "the United States did not present evidence showing that it or the Lummi Nation was currently in possession of the

tidelands." Pet. App. 13 n.7. The court of appeals was mistaken.

First, when tidelands are owned by the government apart from adjoining uplands, they generally cannot be "possess[ed]" in the same manner as the uplands. Although the United States and Lummis have not built structures or improvements on the tidelands, "the tidelands within the Lummi Reservation have * * * never been alienated," and the United States "continuously has held the tidelands in trust for the Lummi Nation." Pet. App. 6. The Lummi Nation, in turn, has used the tidelands for "access to fishing and shellfish." *Id.* at 18. Moreover, the United States has in the past instituted quiet-title actions on the Lummi's behalf and has previously authorized the Lummi's lease of the tidelands to facilitate upland development. *Id.* at 6, 13. These circumstances are sufficient to make the United States and the Lummis parties in possession for purposes of a trespass or ejectment action.

Even if petitioner were otherwise entitled to assert Washington's ownership of the tidelands, she would face a second dispositive obstacle: preclusion. More than 70 years ago, the United States obtained a judgment quieting title to the Lummi tidelands against private landowners who claimed title through the State of Washington and who were represented by the Washington Attorney General. *United States* v. *Stotts*, 49 F.2d 619, 620-621 (W.D. Wash. 1930). Although not formally a party in *Stotts*, the State assumed control of that litigation and is bound by the result. *Montana* v. *United States*, 440 U.S. 147, 154-155 (1979) (estoppel applies against government where government assumed control over litigation by private contractor). The court of appeals rejected application of the preclusion bar on the ground that "the prior

cases that the government relies on do not involve [petitioner] and the [petitioner is] not subject to the binding effect of the prior judgments." Pet. App. 13 n.7. The salient fact, however, is that the State of Washington controlled the litigation in *Stotts*; the State is therefore "subject to [its] binding effect," *ibid.*, and petitioner may not litigate on Washington's behalf a legal issue that the State could not litigate on its own. Cf. *Taylor* v. *Sturgell*, 128 S. Ct. 2161, 2173 (2008) ("[A] party bound by a judgment may not avoid its preclusive force by relitigating through a proxy.").

c. In any event, even if petitioner could assert Washington's purported title in the tidelands, the court of appeals correctly rejected that defense on the merits. See Pet. App. 12-18.

It has long been settled in the federal courts within the Ninth Circuit that the United States, not Washington, owns the tidelands contiguous to the Lummi Reservation. See *United States* v. *Romaine*, 255 F. 253, 259-260 (1919) (Land extending to the "low-water mark on the shore of the Gulf of Georgia" was reserved for the Lummi Nation, and Washington upon statehood "forever disclaim[ed] all right and title" to lands reserved for Indians.); *Stotts*, 49 F.2d at 620-621 (confirming in quiet title action that United States, not Washington, owned the Lummi tidelands); see also *United States* v. *Washington*, 969 F.2d 752, 756-757 (9th Cir. 1992), cert. denied, 507 U.S. 1051 (1993). And as this Court long ago explained, "[w]here questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change." *Minnesota Co.* v. *National Co.*, 70 U.S. (3 Wall.) 332, 334

(1866); see *Arizona* v. *California*, 460 U.S. 605, 620 (1983) ("Our reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered open."). In this case, for example, parties in the area have ordered their affairs in recognition of the United States' long-recognized ownership of the tidelands on behalf of the Lummi Nation. See Pet. App. 6, 15 (explaining that a Sandy Point homeowners' association leased tidelands from the Lummi Nation between 1963 and 1988).

Finally, petitioner's assertion of Washington's purported title to the tidelands would fail even without consideration of the *stare decisis* effect of prior decisions on that question. Although the equal footing doctrine establishes a "strong presumption" that the title to submerged lands passed to newly admitted States upon their admission to statehood, *Idaho* v. *United States*, 533 U.S. 262, 272-273 (2001), that presumption can be rebutted when, prior to statehood (1) the Executive clearly reserved submerged lands for another purpose, and (2) in the statehood act, Congress "recognizes the reservation in a way that demonstrates an intent to defeat state title." *Id.* at 273; see *Alaska* v. *United States (Glacier Bay)*, 545 U.S. 75, 100-111 (2005); *United States* v. *Alaska (Arctic Coast)*, 521 U.S. 1, 36-46, 50-61 (1997).

Petitioner does not dispute that the tidelands adjacent to her property were clearly reserved for the Lummi Nation in President Grant's 1873 Executive Order. She contends (Pet. 36-40), however, that Washington's statehood statute did not affirm that tideland reservation and therefore did not prevent title from passing to the State. The court of appeals correctly rejected that argument. Pet. App. 17-18.

In 1889, Congress admitted Washington to statehood on condition that the

> people inhabiting said proposed State[] do agree and declare that they forever disclaim all right and title to * * * all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States.

Act of Feb. 22, 1889, ch. 180, 25 Stat. 677. Although petitioner characterizes that language as a "boilerplate disclaimer" insufficient to defeat state title (Pet. 37-40), this Court affirmed federal title to submerged lands within the Arctic National Wildlife Refuge and the Glacier Bay National Monument on facts materially indistinguishable from those in this case. *Alaska (Glacier Bay)*, 545 U.S. at 100-111; *Alaska (Arctic Coast)*, 521 U.S. at 50-61.

In both those cases, the Court relied on Section 6(e) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 340, which reserved from transfer to the State "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." *Alaska (Glacier Bay)*, 545 U.S. at 104-105 (citation omitted); *Alaska (Arctic Coast)*, 521 U.S. at 55. Like the proviso in the present case, which encompasses "lands * * * owned or held by any Indian or Indian tribes," Pet. App. 13, Section 6(e) did not mention the subject reservations by name or specifically refer to submerged lands on the reservations. See *Alaska (Glacier Bay)*, 545 U.S. at 104-105 (discussing Section 6(e)). Nevertheless, this Court held that the general proviso was sufficient to defeat state title to submerged lands because the reservations in question were plainly within the scope of the proviso and because the

executive orders creating the reservations clearly included submerged lands. *Id.* at 100-101, 104-106; *Alaska (Arctic Coast)*, 521 U.S. at 55-57. The court of appeals correctly followed those precedents. Pet. App. 17-18.

The court of appeals' ruling is also consistent with this Court's decision in *Idaho*, *supra*. Like the present case, *Idaho* involved a pre-statehood Executive Order that reserved submerged lands for a tribe (the Coeur d'Alene Tribe), and a statehood act in which the State "forever disclaim[ed] all right and title to * * * lands * * * owned or held by any Indians or Indian tribes." 533 U.S. at 270, 274 (brackets in original) (citation omitted). The Court found the reservation of submerged lands effective because "Congress [had] recognize[d] the reservation in a way that demonstrates an intent to defeat state title." *Id.* at 273. The court stated that the dispositive factors were whether "Congress was on notice that the Executive reservation included submerged lands * * * and whether the purpose of the reservation would have been compromised if the submerged lands had passed to the State." *Id.* at 273-274. Here, Congress was "aware that the President's executive order added the tidelands to the reservation," Pet. App. 17, and the purpose of the reservation would have been compromised by ceding the tidelands to the State because "the Lummi and other Pacific Northwest tribes have depended heavily on fishing and digging for shellfish as a means of subsistence," *id.* at 18.

2. Petitioner also contends that she could not properly be held liable for trespass even if the United States holds title to the tidelands. See Pet. 12-19. The court of appeals' trespass holding correctly applies settled law to the facts of this case and does not conflict with any decision of this Court or any other court of appeals.

a. As petitioner acknowledges (Pet. 18), it is a long-settled rule of the common law that a boundary marked by a body of water is "ambulatory; that is, it changes when the water body shifts course or changes in volume." Pet. App. 20. Although the upland owner "gains when land is gradually added through accretion," she "loses title in favor of the tideland owner—often the state—when land is lost to the sea by erosion or submergence." *Ibid.*; accord *Oklahoma* v. *Texas*, 268 U.S. 252, 256 (1925) ("These changes all resulted from the natural and gradual processes of accretion and erosion[.] * * * Where, as here, a boundary bank is changed by these processes the boundary, whether private or public, follows the change."); *County of St. Clair* v. *Lovingston*, 90 U.S. (23 Wall.) 46, 69 (1874) ("The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his.").

The court of appeals' decision was a straightforward application of this longstanding rule. The court affirmed the district court's injunction requiring petitioner to "remove all rock, riprap, and other shore defense structures that are located seaward" of the MHWL. Pet. App. 62; see *id.* at 28 ("It is undisputed that as of the 2002 survey, some of the Homeowners' shore defense structures sat seaward of the MHW[L]."). Because the line between petitioner's property and the tidelands is the MHWL, structures seaward of that line are not on petitioner's property, and their maintenance effects a trespass. See *id.* at 29.

Petitioner argues that the court of appeals' decision "ignores that the placement of a structure on one's own land becomes part of the land and the MHW[L] * * * stops at the face of that structure." Pet. 16. Petitioner

cites no authority suggesting that an upland property owner may unilaterally and permanently fix the ambulatory boundary between her property and that of the tideland owner.[1] Her argument also ignores the "largely undisputed evidence" that her structures cause environmental damage to the tidelands. Pet. App. 61. Petitioner's approach would also disrupt the symmetry in the longstanding common law rule, since that rule does not permit "[t]he Lummi * * * [to] erect structures on the tidelands that would permanently fix the boundary and prevent accretion benefitting the Homeowners." *Id.* at 27.

In any event, even if petitioner were entitled to prevent the movement of the MHWL by placing structures on her upland property, the disposition of this case would not be affected. The district court's injunction requires petitioner to remove all structures "seaward of [the] MHW[L] as that line is determined on the government's January 2002 survey." Pet. App. 62. The 2002 survey establishes the MHWL in relation to the existing shoreline as improved, Appellants' E.R. Doc. 231, at 1-14, which is petitioner's preferred way of establishing the line. Petitioner has thus been enjoined not for attempting to prevent the MHWL from moving, or for maintaining structures seaward of the MHWL that would have existed in the structures' absence, but only for maintaining structures seaward of the MHWL on the shore as it presently exists.

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[1] Petitioner's reliance (17 n.11) on *Save Oregon's Cape Kiwanda Organization* v. *Tillamook County*, 34 P.3d 745 (Or. App. 2001), is misplaced. That case involved review of an administrative board's zoning decision; it had nothing to do with the property line between upland and tideland owners.

Petitioner further contends (Pet. 15-16) that the court of appeals improperly disregarded the "common enemy doctrine," which "applies as a defense to nuisance or trespass actions where a property owner has caused surface waters—the 'common enemy' of all landowners—to invade a neighbor's property." Pet. App. 24-25. As the court of appeals correctly explained, that doctrine has no application to a situation like that presented here. See *id.* at 25-26. The claim in this case is not that petitioner's shore defense structures have indirectly caused water to encroach on a neighbor's land. Instead, the claim is that the structures *themselves* are the encroachment, since they stand on the tidelands owned by the United States in trust for the Lummi Nation.

Petitioner cites no decision applying the "common enemy doctrine" in this situation. In any event, although "federal law ultimately controls the issue" in a case like this one, "state law should be borrowed as the federal rule of decision" unless there is a "need for a nationally uniform body of law" or "application of state law would frustrate federal policy or functions." *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 671-673 (1979); see *California ex rel. State Lands Comm'n* v. *United States*, 457 U.S. 273, 283 (1982). Petitioner identifies no basis for concluding that a uniform national rule is needed in this context, and she acknowledges (Pet. 16 n.9) that under Washington law "the common enemy doctrine does not apply to seawater." *Grundy* v. *Thurston County*, 117 P.3d 1089, 1094 (Wash. 2005).[2]

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[2] The court of appeals found it unnecessary to decide whether Washington law provided the rule of decision on this issue because it found the common enemy doctrine inapplicable in any event. Pet. App. 10 n.6. At the same time, the court expressed skepticism that a uniform federal rule would govern, "not[ing] that it would be anomalous for the *Grundy*

b. Petitioner argues that the court of appeals' trespass holding "will have dramatic impacts along the coastline" and that it puts "large areas of reclaimed land" in New Orleans and other cities "at risk of being claimed by the tideland owner." Pet. 13, 14; see Pacific Legal Found. et al. Amicus Br. 9-10. Those concerns are unfounded. As explained above, the court of appeals' decision broke no new ground, but rather applied a rule governing ambulatory property lines that "date[s] back to Roman times." Pet. App. 21. Moreover, this case does not present a situation analogous to one involving "reclaimed" dry land in cities such as New Orleans. Pet. 14. As noted, the court's injunction only requires petitioner to remove her structures that are below the point where the actual MHWL currently lies on the improved shoreline. Pet. App. 62.

The practical significance of the court of appeals' holding is further diminished by the fact that the relationship between upland and tideland owners is typically governed by state rather than federal law. See Pet. App. 27 n.11. The trespass claim in this case arose under federal law because the United States owns the tidelands for the beneficial use of an Indian tribe, which uses the land for fishing and digging for shellfish. *Id.* at 18. This is not the ordinary circumstance of coastal ownership. And as the court of appeals further recognized, where a tideland owner has long acquiesced in the existence of erosion control structures (or entire cities, see Pet. 14) seaward of the MHWL, doctrines such as estoppel and adverse possession may provide a complete defense to any tres-

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decision to apply to other coastal property owners in Washington, yet not to this small group of homeowners." *Ibid.*

pass action. Pet. App. 34 n.13; see Lummi Br. in Opp. 15.[3]

3. Petitioner also challenges the court of appeals' affirmance of the district court's finding of liability under the 1899 RHA. Pet. 19-28. That issue does not warrant this Court's review.

a. For two independent reasons, this case is an unsuitable vehicle for addressing the scope of the 1899 RHA.

First, unless this Court reviews and reverses the holding of the courts below that petitioner was liable for common-law trespass, the Court's interpretation of the 1899 RHA would have no meaningful practical impact on the disposition of this case. The district court's finding that some of petitioner's shore defense structures constituted a trespass, and its determination that those structures violated the 1899 RHA, were both premised on the fact that the structures were seaward of the MHWL. See Pet. App. 52-53 (trespass); *id.* at 58 (1899 RHA). Likewise, the core remedy for the two claims was the same—removal of the structures. *Id.* at 59 ("Plaintiffs seek an injunction against Defendants to remove any part of the shore defense structures that lie below MHW[L], having waived damages. Such an injunction is available for both

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[3] Amici Pacific Legal Found. et al. attempt to introduce a distinct issue into the case by arguing (Br. 8-9) that the court of appeals' ruling will unsettle prior understandings as to the scope of tribal fishing rights. That is incorrect. Under the Treaty of Point Elliot, various Tribes reserved a right to off-reservation fishing at "usual and accustomed" fishing grounds, a right held in common with all citizens. See *United States* v. *Washington*, 384 F. Supp. 312, 332 (W.D. Wash. 1974) (describing treaty). These rights are distinct from the Tribes' exclusive rights to fishing within the area of their reservations. *Id.* at 332 n.12. The court of appeals' decision has no bearing on the scope of off-reservation fishing rights.

the trespass and the [1899] RHA violation."). Although the district court as a formal matter issued the injunction under the 1899 RHA, it noted that a separate injunction for trespass was unnecessary because "the trespass claim is coextensive with the [1899] RHA claim." *Id.* at 61. Indeed, the district court declined to limit the injunction to an order that petitioner obtain an 1899 RHA permit for the structures because "such an injunction would not remedy the trespass." *Id.* at 59.

Second, a grant of certiorari to review the applicability of Section 403 of the 1899 RHA to structures that are maintained in the navigable waters of the United States (but originally built outside those waters) would be unwarranted because of the possible relevance of another statutory provision to that question. In 2005, four years after the United States filed its complaint in this case, the codifiers of the United States Code restored a provision, titled "Creation or continuance of obstruction of navigable waters," that provides:

> The creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The *continuance* of any such obstruction, except bridges, piers, docks, and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense and each week's continuance of any such obstruction shall be deemed a separate offense. * * * [I]n the discretion of the court, the creating or *continuing* of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any district court exercising jurisdiction in any district in which such obstruction may be threat-

> ened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States.

33 U.S.C. 403a (emphases added).

The codifiers explained that the "[t]ext of [this] section," which is from the Act of Sept. 19, 1890, ch. 907, § 10, 26 Stat. 454 (1890 RHA), "was previously omitted from the Code." 33 U.S.C. 403a (Supp. III 2003) (codification note).[4] The codifiers restored it, however, "in view of conflicting court decisions as to whether or not [the] section had been repealed or superseded." *Ibid.*[5]

Now that Section 403a appears in the United States Code, it is "prima facie the law[] of the United States." 1 U.S.C. 204(a). Given the potential relevance of this provision to the question whether the "continuance" of a structure (that is not like a "bridge[], pier[], dock[], [or] whar[f]") in the navigable waters of the United States violates federal law, 33 U.S.C. 403a, the Court should not consider that question in a case where the provision's applicability and continued legal effectiveness have not been litigated.

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[4] The cited supplement to the United States Code was published in 2005.

[5] The conflicting decisions referenced by the codifiers are *United States* v. *Wishkah Boom Co.*, 136 F. 42 (9th Cir. 1905), and *United States* v. *Wilson*, 235 F.2d 251 (2d Cir. 1956). In *Wishkah Boom Co.*, the United States alleged that the defendant had maintained a boom that obstructed the Wishkah River. 136 F. at 43. The court of appeals held that, separate and apart from any provision of the 1899 RHA, Section 10 of the 1890 RHA (now codified at 33 U.S.C. 403a) plainly covered "the maintenance of * * * obstructions." *Wishkah Boom Co.*, 136 F. at 45. By contrast, the Second Circuit held in *Wilson* that "[Section] 10 of the Rivers and Harbors Act of 1890 was repealed by the Act of 1899." 235 F.2d at 252.

b. In any event, the court of appeals correctly applied the 1899 RHA to the facts of this case, and its holding does not conflict with the decision of any other court.

It is undisputed that petitioner currently maintains shore defense structures in waters covered by the 1899 RHA, and that she has not received a permit to do so from the Corps. Petitioner contends, however, that her conduct does not violate the 1899 RHA because the structures in question were "built entirely outside of navigable waters" at the time they were erected. Pet. 21.[6] That argument lacks merit.

Since 1974, a Corps regulation has required a Section 403 permit for *any* "structures and/or work in or affecting navigable waters of the United States." 33 C.F.R. 322.3; see 33 C.F.R. 209.120(e)(1) (1974) ("Department of the Army authorizations are required under the River and Harbor Act of 1899 * * * for all structures or work in navigable waters of the United States."). As the court of appeals explained, "[t]he Corps' regulations confirm that structures may be obstructions without regard to how the structures came to be in navigable waters." Pet. App. 32 n.12. That administrative construction is entitled to substantial deference. See *United States* v. *Alaska*, 503 U.S. 569, 582 (1992) (deferring to Corps' 1899 RHA regulation adopting "a broad interpretation of agency power" under Section 403); *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 490 n.5 (1960) (noting that the

[6] Contrary to petitioners' assertion (Pet. 26), the court of appeals did not "acknowledge[]" that petitioner's structure "was built above the MHW[L]." Rather, the court stated only that "[t]he Homeowners' structures may have been legal as initially built." Pet. App. 32. The court's conclusion that Section 403 precludes continued maintenance of those structures to the extent they are now below the MHWL, see *id.* at 32-36, rendered irrelevant any potential factual dispute as to the circumstances under which those structures were built.

Corps' "long-standing administrative construction" of the 1899 RHA was "entitled to 'great weight'") (citation omitted).[7]

The Corps' view that a defendant cannot be permitted to maintain structures in the navigable waters of the United States is reasonable in light of the "broad" language of Section 403, *Alaska*, 503 U.S. at 576, and its purpose of "prevent[ing] obstructions in the Nation's waterways," *Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191, 201 (1967).[8] Petitioner's contrary interpretation of Section 403 would preclude the Corps from exercising regulatory authority over structures within navigable waters—without regard to their impact on navigation or other relevant factors—in any case where the Corps is unable to establish that the structures were within navigable waters when built. Because it is often

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[7] It is settled that the 1899 RHA is "read * * * charitably in light of the purpose to be served," *Republic Steel Corp.*, 362 U.S. at 491, even though it can be enforced through both criminal sanctions and, as here, suits for injunctions, 33 U.S.C. 406. Moreover, deference to a long-standing administrative regulation is appropriate even when it construes a statute that is enforced both civilly and criminally. *Babbitt* v. *Sweet Home Chapter of Cmtys.*, 515 U.S. 687, 704 n.18 (1995). The possible interaction between the rule of lenity and principles of administrative deference is one of the issues before the Court in *Barber* v. *Thomas*, No. 09-5201 (argued Mar. 30, 2010). It is not necessary to hold this petition for *Barber*, since this Court has already held that the Corps' regulations interpreting the 1899 RHA are entitled to deference. See *Alaska*, 503 U.S. at 582; *Republic Steel Corp.*, 362 U.S. at 490 n.5.

[8] This Court has observed that the 1899 RHA was intended "to contain 'no essential changes in the existing law'" laid down in the 1890 RHA, and it has therefore construed the later statute against the backdrop of the earlier one. *Republic Steel Corp.*, 362 U.S. at 486 (citation omitted). Whether or not 33 U.S.C. 403a remains in effect (see pp. 19-20, *supra*), the Corps' construction of the 1899 RHA harmonizes it with the 1890 RHA.

difficult (and sometimes impossible) to establish the pre-existing MHWL after a shoreline project is completed, petitioners' interpretation would encourage coastal owners to complete projects in tidal zones without conducting surveys or seeking advance authorization from the Corps.

Nothing in the text of Section 403 compels that anomalous result. The first clause of Section 403 categorically prohibits "[t]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States." 33 U.S.C. 403. Whether or not the structures at issue here were below the MHWL when they were built, they are currently located in the "waters of the United States" and their presence there "creat[es]" an "obstruction." *Ibid.*

Petitioner contends that her structures do not fall within the first clause of Section 403 because there was no showing that they "actually impacted navigation." Pet. 23. The prohibition imposed by Section 403's first clause, however, does not depend on proof of such an impact. "[T]he concept of 'obstruction'" as used in the first clause of Section 403 has "a broad sweep." *Republic Steel Corp.*, 362 U.S. at 487 (quoting 33 U.S.C. 403). "It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity." *Ibid.* (quoting *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 708 (1899)). The structures listed in the second clause of Section 403 are "*presumed* to constitute obstructions" for purposes of the first clause. *Sierra Club* v. *Andrus*, 610 F.2d 581, 596 (9th Cir. 1979), rev'd on other grounds *sub nom. California* v. *Sierra Club*, 451 U.S. 287 (1981); accord *Norfolk & W. Co.* v. *United States*, 641 F.2d 1201, 1210 (6th Cir. 1980). Petitioner does not dispute that her rip rap and bulkhead are such

"structures"; she contends only that she did not build them in the navigable waters of the United States. Even if that is sufficient to take them outside the scope of the second clause of Section 403, it does not alter the fundamental nature of the structures or the presumption that they are obstructions to the navigable capacity of the waters of the United States.[9]

b. Petitioner argues (Pet. 21-22) that the court of appeals' finding of liability under Section 403 conflicts with 33 U.S.C. 407. That provision of the 1899 RHA, commonly known as the "Refuse Act," makes it unlawful (1) "to throw, discharge, or deposit * * * any refuse matter of any kind or description * * * into any navigable water" or (2) "to deposit * * * material of any kind * * * on the bank of any navigable water * * * where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods * * * whereby navigation shall or may be impeded or obstructed." *Ibid.* Petitioner argues (Pet. 22)

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[9] Petitioner further contends that the first clause of Section 403 should be construed narrowly because obstructions covered by that clause "cannot be authorized by the Corps, but only by Congress." Pet. 23. This Court has recognized, however, that the Corps may grant a permit for conduct that would otherwise violate any of Section 403's clauses. In *Republic Steel Corp.*, the Court held that the activity at issue (depositing industrial solids at the bottom of a river) fell within the first clause of Section 403 but not the second or third. See 362 U.S. at 486-489. The Court concluded that the United States was entitled to an injunction, not because Congress had failed to enact site-specific legislation allowing the activity to proceed, but because the defendant had not "first obtain[ed] a permit from the Chief of Engineers of the Army." *Id.* at 483; see *Sanitary Dist.* v. *United States*, 266 U.S. 405, 423, 429 (1925) (Holmes, J.) (Withdrawal of water from Lake Michigan "will * * * create an obstruction to the navigable capacity" of the lake and is thus "prohibited by Congress, except so far as it may be authorized by the Secretary of War.").

that Congress intended the second of those prohibitions to be the exclusive mechanism to control the "placement of material on banks." Petitioner further argues (*ibid.*) that, because that prohibition is limited to conduct that "affect[s] navigation," the Ninth Circuit's ruling in this case—which found petitioner liable under Section 403 without proof of an impact on navigation— "circumvents" Section 407's limitations.

Contrary to petitioners' contention, the plain terms of Sections 407 and 403 make clear that they address two separate issues. Section 407 addresses deposits that are "liable to be washed into" navigable water, 33 U.S.C. 407, while Section 403 covers "structures" such as seawalls or bulkheads, 33 U.S.C. 403. This Court's observation that the second clause of Section 407 is "limited to deposits that shall or may impede or obstruct navigation," *United States* v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 670 n.23 (1973), is not relevant to Section 403.

c. The court of appeals concluded that, so long as petitioner had "intentionally erected structures that became obstructions," the government was not required to prove that petitioner "intended to violate the [1899] RHA." Pet. App. 36. Contrary to petitioner's contention (Pet. 28-29), that holding does not conflict with the Third Circuit's decision in *United States* v. *Ohio Barge Lines, Inc.*, 607 F.2d 624 (1979). In *Ohio Barge Lines*, the court concluded that Section 403 did not impose "strict liability" by covering conduct, such as the completely "innocent sinking of vessels," over which a defendant had no control. *Id.* at 627-628. That rule would not assist petitioner because she "intentionally erected structures that became obstructions," Pet. App. 36, and "it was reasonably foreseeable that erosion would one day impact the shore defense structures so that they would be located

seaward of MHW[L] and be considered obstructions to navigation," *id.* at 57 n.7.[10]

4. Petitioner contends that the court of appeals erred in two respects in affirming the district court's injunction. She argues that the 1899 RHA did not authorize an injunction because the structures were not in the navigable waters of the United States when "erect[ed]" (Pet. 30), and that the court of appeals improperly failed to balance "competing interests" before issuing the injunction (Pet. 31). This petition is a poor vehicle for addressing those challenges, which lack merit in any event.

a. As noted above, the injunction in this case would be justified by the finding of liability for trespass. See pp. 18-19, *supra*. Because petitioner does not contend that an injunction to halt the trespass was unavailable, any finding of error under the 1899 RHA's injunction provision would not ultimately relieve petitioner of her obligation to remove the encroaching structures.

b. Petitioner contends that the court had no injunctive authority over the shore defense structures because they were not "erected in violation" of the 1899 RHA. 33 U.S.C. 406; see Pet. 30-31. This Court rejected a similar

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[10] Amici Bay Planning Coal. et al. contend (at 14) that petitioner's liability under the 1899 RHA means that construction without a permit on "reclaimed land," such as that in downtown San Francisco, also violates the statute. That is incorrect. As the court of appeals explained, "whether navigable waters reach the MHW[L] in its unobstructed state or in its obstructed state is irrelevant here, because [petitioner is] liable either way." Pet. App. 33 (noting that "at least some rip rap from the shore defense structures sits below the MHW line, and that rip rap has not so obstructed the movement of the tide that it is prevented from flowing landward of this scattered rip rap"). In addition, the court of appeals noted that at some point "the government may be estopped from asserting its jurisdiction [under the 1899 RHA] because land has long ago been filled in." *Id.* at 34 n.13.

argument 50 years ago in *United States* v. *Republic Steel Corp.*, *supra*. In that case, the court of appeals had held that even if a violation of 33 U.S.C. 403 had been established, "no relief by injunction is permitted" because 33 U.S.C. 406, "in specifically providing for relief by injunction[,] refers only to the removal of 'structures' erected in violation of the Act." *Republic Steel Corp.*, 362 U.S. at 491 (citing *United States* v. *Bigan*, 274 F.2d 729 (3d Cir. 1960)).[11]

This Court reversed, holding that the courts retained general equitable power—beyond the specific injunction authority of 33 U.S.C. 406—to enjoin violations of the 1899 RHA. *Republic Steel Corp.*, 362 U.S. at 492. "Congress has legislated and made its purpose clear; it has provided enough federal law in [Section 403] from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation." *Ibid.* Accordingly, if the shore defense structures violated 33 U.S.C. 403, the district court had injunctive authority over them.[12]

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[11] Petitioner relies (Pet. 30-31) on the *Bigan* court's narrow understanding of the courts' injunctive authority to remedy 1899 RIIA violations. As explained in the text, however, this Court in *Republic Steel Corporation* rejected that approach.

[12] In the typical case, a party with an unpermitted structure in the navigable waters of the United States will be required to apply for an after-the-fact permit, see, *e.g.*, 33 C.F.R. 326.3, and then remove the structure only if the permit is denied. As the district court concluded, however, such a remedy would have been inadequate under the unusual circumstances of this case because it "would not remedy the trespass." Pet. App. 59. The district court's statement in dicta that "after-the-fact permits" are generally unavailable, *id.* at 60, was incorrect. See 33 CFR 326.3(e).

c. Petitioner also contends (Pet. 31-32) that the lower courts erred in ordering removal of her shore defense structures without "balancing" her interest in maintaining them against the government's interests in their removal. There is no conflict in the courts of appeals on the standard for determining when an injunction is appropriate to remedy a violation of the 1899 RHA. As petitioner acknowledges (Pet. 31), the only other court of appeals to address the question follows the same approach as the Ninth Circuit in this case. See *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974) (dictum), cert. denied, 420 U.S. 927 (1975).

Nor does the court of appeals' analysis of this question conflict with this Court's decision in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). There the Court concluded that the Clean Water Act did not divest the courts of their background equitable authority to weigh competing interests before issuing injunctions. See *id.* at 311-319. The Court recognized, however, that certain statutory schemes may effectively "foreclose[] the exercise of the usual discretion possessed by a court of equity," *id.* at 313, and that circumstances may arise in which "only an injunction could vindicate the objectives of the" relevant law, *id.* at 314 (citing *TVA* v. *Hill*, 437 U.S. 153, 173 (1978)).

The 1899 RHA is "an assertion of the sovereign power of the United States" and "was obviously intended to prevent obstructions in the Nation's waterways." *Wyandotte Transp. Co.*, 389 U.S. at 201. Absent a permit issued by the Corps, Section 403 establishes blanket prohibitions on the erection and maintenance of structures in the navigable waters of the United States. To allow parties like petitioner to avoid compliance by attempting to establish that their "interest" in certain unpermitted

structures outweighed the government's interest in keeping the navigable waters clear would defeat the statutory design. In any event, petitioner offers no reason to suppose that the courts below would have declined to order injunctive relief if they had conducted an express balancing of interests. Petitioner's suggestion that equitable factors weighed against an injunction is particularly unpersuasive given (a) the fact that petitioner seeks to maintain structures on tidelands owned by the United States in trust for the Lummi Nation, and (b) the district court's observation that "it is largely undisputed that the shore defense structures have negative environmental consequences." Pet. App. 61.[13]

---

[13] Questions related to the proper standard for issuing an injunction to remedy a violation of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, are before the Court in *Monsanto Co.* v. *Geertson Seed Farms*, No. 09-475 (oral argument scheduled for Apr. 27, 2010). In that case, the United States contends that "the court of appeals erred in affirming a permanent nationwide injunction based on a legal standard that presumed irreparable harm." Gov't Br. at i, *Monsanto*, *supra*, No. 09-475. It is not necessary to hold this case for *Monsanto*, given that the injunction in this case is independently supportable by the finding of liability for trespass. Moreover, an injunction sought by the United States to remedy a violation of a substantive statute like the 1899 RHA presents issues distinct from the injunction at issue in *Monsanto*, which was premised on a finding that the government had failed to follow NEPA's procedural requirements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 09-820

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In The
Supreme Court of the United States

MARY D. SHARP,

Petitioner,

vs.

UNITED STATES OF AMERICA,
on its own behalf and as trustee
on behalf of the Lummi Nation, and
THE LUMMI NATION,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY TO STATEMENT

This case involves a homeowner's shore defense structure, protecting her property from storm surges in Washington State. The court ordered her to remove the structure as a violation of the Rivers and Harbors Act (RHA) even though no RHA permit was required when the structure was built. Her structure was also held to constitute a trespass even though it was built on her own land and the beach which separated her structure from the property boundary, the Mean High Water Line (MHWL), has eroded away so that MHWL now at times extends to her structure.

The United States begins its brief with a statement recounting its version of the facts. Brief for the United States in Opposition (US Brief) at 1. A couple of points need clarification.

In its first sentence, it introduces a concept which is repeated through its brief that Mrs. Sharp "maintains" a shore defense structure. Importantly, her liability is not for maintenance *activities* because in this case "maintain" simply means to allow to exist.

Mrs. Sharp contends that the tidelands are not owned by the United States, but were transferred to the State of Washington at statehood. In discussing the Executive Order which expanded the reservation, the Government asserts that the inclusion of tidelands "reflect[ed] the Lummi's historic use of tidelands for fishing and harvesting shellfish." US Brief at 2 (citing Pet. App. 18). However, the Lummi already had treaty rights to fish and shellfish from

tidelands regardless of whether they were within a reservation. *See United States v. Washington*, 520 F.2d 676 (9th Cir. 1975). Historic fishing or shellfishing by a tribe is no reason to expect that tidelands were reserved. *See United States v. Aam*, 887 F.2d 190 (9th Cir. 1989); *Skokomish Indian Tribe v. France*, 320 F.2d 205 (9th Cir. 1963). Instead, inclusion of tidelands would prohibit non-tribal members from setting up camps immediately outside of the reserved uplands until tribal members could obtain title to their allotments.

Finally, the United States describes the district court's injunction as if it were a small thing, merely "directing the structures' removal." US Brief at 7 (citing Pet. App. 36). Instead, it is a mandatory *perpetual* injunction that requires Mrs. Sharp to remove portions of her structure in perpetuity as the MHWL continues to move landward. Pet. App. 62-63.

REPLY TO ARGUMENT

1. Trespass

The Government argues that this case is not suitable for resolving a fundamental property issue for several reasons.

First, the Government notes that the State of Washington is not a party. This poses no bar to Mrs. Sharp's defense of the trespass action. *See* Pet. App. 12 n.7. That holding was based not only on clear

precedent, *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1255-56 (9th Cir. 1983), but also on the general law of trespass in circumstances where the plaintiff is not in possession. Pet. App. 12 n.7.

In response, the Government argues that tidelands cannot be "possessed" in the same manner as other property. US Brief 9. It argues that the Government has not parted with legal title to the tidelands and that the legal status has been "held in trust." *Id.* But assertions about legal title or status are not the same as possession. The latter is a concept based on physical and observable realities as to presence on the property at issue.

The government next claims that the Lummi Nation has used the tidelands generally for fishing and shellfishing. *Id.* (citing Pet. App. 18). Of course, the court of appeals was referring to tidelands generally and historically. It was not addressing use of the tidelands at the time the suit was brought. Use of tidelands generally does not mean the Lummi Nation was using the tidelands at the location of Mrs. Sharp's bulkhead or riprap.

Because the rulings in this case are based on the premise that the shore defense structure was built on uplands at the time of construction, it is impossible for the United States or the Lummi Nation to have possessed the site of this shore defense structure at the time of its construction.

Finally on this point, the Government asserts that it instituted quiet title actions (decades ago) and

authorized a lease in 1963 and that such is sufficient to equate to possession. Mere assertions of legal title is insufficient to constitute possession. As the court of appeals agreed, petitioner is not precluded from arguing that the state owns the tidelands on which her shore defense structure rests.

The Government also asserts that preclusion prevents this Court from deciding whether the tidelands bordering Mrs. Sharp's home belong to the United States simply because a court found that tidelands in front of someone else's property belonged to the United States. US Brief 9 (citing *United States v. Stotts*, 49 F.2d 619 (W.D. Wash. 1930)). The court of appeals soundly rejected this defense. Pet. App. 12-13 n.7.

2. Equal Footing Doctrine

Petitioner argues that the tidelands in front of her property were transferred to the State at statehood under the equal footing doctrine because Congress took no action to reserve these tidelands from the state.

The Government raises several responses. First, it argues that prior cases generally on ownership of tidelands at Sandy Point have become a rule of property. Certain precedents that become rules of property because titles could be jeopardized if they are not followed. For example, an upland owner cannot place artificial fill on submerged lands to gain uplands, but an upland owner can hold back the sea from the

uplands. *United States v. California*, 381 U.S. 139, 176-77 (1965). The Government is not arguing that some precedent on property law generally is a rule of property.

Instead, the Government appears to be relying on the other category of rules of property where title to specific land has been adjudicated. Such adjudications generally should not be reversed when the settling of title has long been relied upon by others. The court of appeals recognized that earlier cases never adjudicated title to tidelands fronting Mrs. Sharp's property. Nevertheless, the Government argues that parties in the area have ordered their affairs on the assumption that the Lummi Nation owns the tidelands. US Brief 11 (citing lease from 1963 to 1988). However, this vastly overstates reality, given that petitioner was never a party to that lease, that no lease has existed for 22 years, and nothing else suggests that ownership of the tidelands in front of her property is considered settled.

Second, as to the merits of the equal footing doctrine issue, the second of the two factors is at issue: Congressional recognition of the "reservation in a way that demonstrates an intent to defeat state title." US Brief 11 (citing *Idaho v. United States*, 533 U.S. 262, 273 (2001)).

The Government argues that admitting Washington to a state required a disclaimer of title to land owned or held by Indians. US Brief 12. Its theory is that this standard boilerplate disclaimer was

sufficient to overcome the normal presumption. To support this theory, it relies on *Alaska v. United States* (*Glacier Bay*), 545 U.S. 75, 100-11 (2005) and *United States v. Alaska* (*Arctic Coast*), 521 U.S. 1, 50-61 (1997). US Brief 12. In contrast, the two executive reservations in *Alaska* (*Arctic Coast*) were specifically identified either by name in the case of the petroleum reserve (*id.* at 41) or by reference to a specific purpose in the case of wildlife. *Id.* at 56-57; *Glacier Bay*, 545 U.S. at 104-05.

The Government's assertion that the court of appeals' analysis complies with *Idaho,* 533 U.S. 262 is similarly inaccurate. Under the requirement that Congress be "on notice" of the executive's reservation, the Government merely cites the court of appeals' *assumption* that Congress was put on notice. US Brief 13 (citing Pet. App. 17). If Congressional notice may now be assumed from the mere existence of the executive order, then the notice requirement is relegated to a meaningless prong of the test.

Additionally, the notion that the purpose of the reservation would be compromised if the state received title to the tidelands is unsupported by history or precedent. As indicated *supra* at 1-2, the Lummi Nation has treaty-protected rights to fish and shellfish regardless of ownership of the tidelands.

The Government argues that under the common law waterfront boundaries are "ambulatory." US Brief 14. This argument simply begs the question as to whether the property boundaries are where the water

actually flows or, as held by the court of appeals, where the water would flow if the shore were left in its natural state.

The Government also overstates the symmetry associated with its version of the rule. US Brief 15. In times of accretion, the upland property owner gains ground. But, contrary to the Government's contention, the tideland owner loses nothing – the tidelands continue to adjoin the uplands and simply move seaward as the uplands move seaward. Yet when erosion occurs, the upland owner does lose ground and the tidelands move landward, unless the erosion can be abated.[1]

In regard to the choice of law question, the Government asserts that Mrs. Sharp has identified "no basis for concluding that a uniform national rule is needed." US Brief at 16. However, this Court's decision in *Hughes v. Washington*, 389 U.S. 290 (1967) is clear that state law cannot divest owners of ocean-fronting property of rights under the federal common law.

In response to the amicus curiae brief of Pacific Legal Foundation, the Government asserts that the court of appeals ruling does not apply to reclaimed

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[1] The Government quotes the district court's notation that the defendants in this case ignored the "largely undisputed evidence that shore defense structures cause environmental damage to the tidelands." Pet. App. 61, *cited in* US Brief at 15. Environmental damage was never an issue in this case.

lands, as are common among coastal cities. US Brief 17 (citing Pet. App. 62). Setting aside the fact that the line moves and Petitioner's structure is intersected by the MHWL periodically, the fallacy in the respondent's argument is this: when the MHWL intersects the structure, the actual MHWL does not lie on the shoreline at all – it lies on her structure, as is the case with any dike, embankment or revetment. The court of appeals' rule of property law is that the tideland owner owns the property underneath a structure if the MHWL falls on the face of the structure. The far-reaching consequence of this decision cannot be over-estimated.

To give the impression that this case has little importance, the United States argues that estoppel or adverse possession might be a defense to a trespass action filed by the owners of tidelands abutting a dike in New Orleans, San Francisco or Boston. However, governmental entities are not subject to estoppel or adverse possession, *see, e.g., United States v. Hato Rey Bldg. Co., Inc.*, 886 F.2d 448 (1st Cir. 1989). Additionally, as the MHWL moves, structures holding back the MHWL may not extend in the same place for the entirety of a prescriptive period. The court of appeals' decision that upland owners cannot hold back the water line and prevent erosion has extensive impacts to all coastal property owners.

3. Rivers and Harbors Act (RHA)

As addressed in the petition at 20-21, Section 10 of the RHA contains three prohibitions contained in three clauses. The court of appeals rearranged the text and ruled that the mere existence of the MHWL intersection with petitioner's structure renders it a violation of the RHA even though it needed no permit at the time of construction.

The Government begins with the assertion that there is no "meaningful practical impact" on this case because the injunction could have been imposed under the trespass theory. US Brief 18. However, the argument entirely misses the point because the court ruled there can be no balancing of competing interests as would occur under the trespass cause of action. Pet. App. 36. As stated in the petition, petitioner disagrees with that interpretation of the RHA and that an injunction should not automatically issue under the RHA to remove a structure protecting a home from devastation simply because the structure prevents the Strait of Georgia from expanding slightly with no impact on the navigable capacity.

Nevertheless, the RHA issues are critical precisely because an injunction to be issued under trespass would require the balancing of competing interests, which was not done because the RHA was the purported basis of the injunction. *See Restatement (Second) of Torts* § 941 (1979).

The United States also asserts that review is unwarranted because changes to the text of the codified

version of the RHA now contains 33 U.S.C. Section 403a. US Brief 19. At most, this creates a question as to whether the word "continuance" of an obstruction to the navigable capacity of the nation's waters is a violation of 33 U.S.C. Section 403a. This newly revived section has no effect on whether the first clause of Section 10 requires an obstruction to navigable capacity for a violation to occur.

Both the court of appeals and the Government equate obstructions to navigable capacity and structures built in navigable waters. "[S]tructures listed in the second clause of Section 10 are 'presumed to constitute obstructions' for purposes of the first clause." US Brief 23 (quoting *Sierra Club v. Andrus*, 610 F.2d 581, 596 (9th Cir. 1979), *rev'd on other grounds sub nom. California Sierra Club*, 451 U.S. 287 (1981)).[2] The error in the *Sierra Club* decision's statutory construction is manifest: if a structure in navigable waters is equated with an obstruction to navigable capacity in the second clause, none can be permitted by the Corps because only Congress can approve an obstruction to the navigable capacity of a waterway.

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[2] The Government also cites *Norfolk & W. Co. v. United States*, 641 F.2d 1201, 1210 (6th Cir. 1980) to support this conclusion in *Sierra Club*. However, the court in *Norfolk* merely repeats the rule that obstructions to navigable capacity do not require a showing that ships could not enter the waterway when a dock collapsed. This rule arising out of collapsed commercial dock is a far cry from a homeowner's bulkhead in a residential area.

The Government attempts to prop up its equating of obstructions under clause one with unpermitted structures in clause two with two arguments. First, it argues that petitioner's interpretation would render the Corps powerless over structures in navigable waters "without regard to their impact on navigation or other relevant factors" in cases where the Corps does not know whether the structures were in navigable waters when built. US Brief 22. This is untrue.

The question as to whether something is an obstruction to navigable capacity is a question of fact. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 729 (1899). The Corps retains the same authority to protect navigable waters from obstructions; it lacks the authority to mandate removal of structure that has no impact on navigable capacity and was built on land when no permit was required.

Second, the Government argues that the Court in *United States v. Republic Steel Corp*, 362 U.S. 482 (1960) held that clause one obstructions do not need Congressional approval, but may be approved by the Corps. US Brief 24 n.9 (citing 362 U.S. 483 and *Sanitary Dist. v. United States*, 266 U.S. 405, 423, 429 (1925)). The cited portion of *Republic Steel* is a description of the Government's suit as one seeking an injunction for failing to get a permit. The Court did not rule that obstructions to navigable capacity do not need Congressional approval. Similarly, the discussion in *Sanitary District* about obstructions to navigable capacity was not essential to the holding

because the lowering of the water in that case would "alter and modify" the condition of the river. Alteration and modification of a waterway are actions which can be permitted under the third clause of Section 10 of the RHA.

In regard to the conflict among the various circuits regarding strict liability, the Government essentially responds that petitioner built her shore defense structure intentionally. US Brief 25-26. While it might be foreseeable that the water line might move, it is not foreseeable that such circumstances automatically makes the structure an obstruction to navigable capacity.

The Government characterizes the District Court's statement that "after-the-fact permits" are generally unavailable as dicta and incorrect. US Brief 27 n.12 (citing Pet. App. 59). The statement is clearly not dicta because petitioner urged the court that any RHA violation should be remedied by an order that she file for an after-the-fact permit. The court of appeals noted that the Government's regulatory concerns could be alleviated by an agreement with the Lummi Nation. App. 44. Given the lack of navigational concerns, removal is too extreme a remedy. Not allowing an after-the-fact permit for a harmless shore defense structure appears to be more about strong arming petitioner to sign an agreement with the Lummi Nation, than about any legitimate navigational concerns.

Finally, there is clearly a conflict with this Court's jurisprudence in *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) on whether courts should balance interests under a regulatory scheme such as the RHA. Whereas the national interest in protecting the nation's waterways may often weigh heavy in the balance, that does not mean there are no situations where the impact on navigation is so speculative and the impact to the private property owner is so devastating that the balance tips against the injunction remedy. Mrs. Sharp's situation is such a case.

CONCLUSION

The petition should be granted and the decision of the Ninth Circuit should be reversed.

DATED: May, 2010.

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In The Supreme Court of the United States

MARY D. SHARP,

Petitioner,

vs.

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, and THE LUMMI NATION

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE BAY PLANNING COALITION AND THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Is the boundary of coastal property, when federal common law supplies the rule of decision (as when the upland is federal property), the mean high water (MHW) line where it *would* fall if seawalls, fill and other works were assumed away, with the result that the tideland owner (usually, the State) owns some indefinite part of the upland?

Is the landward extent of "navigable waters" under the Rivers and Harbors Act of 1899 likewise the MHW line where it would fall if seawalls, fill and other structures were imagined away, with the result that federal permitting authority attaches to work in long-dry areas such as urban waterfronts, airports, and military installations?

Are structures such as seawalls, roadbeds and the like, which were lawful when built, now unlawful as "obstructions to navigation" because they lie waterward of a hypothetical inland MHW line that would exist if man's constructions were imagined to be removed?

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INTEREST OF THE AMICI CURIAE[1]

The Bay Planning Coalition is a not-for-profit California corporation formed in 1983 for the purpose of urging balanced government regulation of the waters and shoreline areas of San Francisco Bay and the California Delta. Its membership then and now comprises the Bay Area port authorities, many of the shoreline cities of the Bay and Delta, large and small private landowners from oil refineries to the operators of small-craft marinas, and engineering and consulting firms. Since its founding it has successfully argued, in courts or in the administrative arena, that various regulatory actions of state and federal agencies were bad policy, or unlawful. It has also argued for environmental regulation. When in 1995 the Governor of California proposed to abolish the San Francisco Bay Conservation and Development Commission, a regional planning agency, the Bay Planning Coalition initiated an alliance with environmental interest groups and led the successful effort to keep that agency in existence.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, amici state that no counsel for a party authored this brief in whole or in part. No person or entity, other than amici and their members, made any monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties. Counsel for amici were not engaged to prepare this brief until February 1, 2010, and so could not secure the written consent of all parties within the ten days required by Rule 37.2(a). The written consents were promptly thereafter secured.

The California Building Industry Association is a statewide nonprofit trade association comprising approximately 3,700 member companies who employ more than 100,000 people. The Association's members are engaged in all facets of planning, entitling, financing, designing, constructing, selling, and maintaining new homes in California. The Association is the recognized "voice" of the residential-development industry in California.

Members of the Bay Planning Coalition and the California Building Industry Association will be adversely affected to a profound degree if the Ninth Circuit's decision stands. So too, as we show, will many federal agencies.

INTRODUCTION AND SUMMARY OF ARGUMENT

In issue in this case are the ownership and regulation of thousands of miles of improved shoreline and hundreds of square miles of dry land currently protected by shore-defense structures from inundation or erosion.

Urbanized lands on the coasts and in the coastal estuaries of the United States are far different today from what they were before urbanization. The waterfronts of New York, Philadelphia and San Francisco look not at all as they looked before development. The same is true in non-urban areas where military installations line the shoreline. To provide access

to the water, and at the same time protect against depredations of wave action, rising water levels, and subsidence (when reclaimed, coastal marshes subside), levees and seawalls have been built to provide a stable, protective shoreline. Often, to provide access to deeper water, authorities have encouraged the filling of waterfront areas, and the erection of seawalls as forward bulwarks against the sea. The result is that much of downtown San Francisco, like New York, is land over which tidewater once flowed and ebbed. *See, e.g., Knudson v. Kearney*, 152 P. 541 (Cal. 1915) overruled in part on grounds not relevant here, *City of Berkeley v. Superior Court*, 162 Cal. Rptr. 327 (Cal. 1980); *Appleby v. New York*, 271 U.S. 364 (1926).

When built in compliance with laws applicable at the time of the construction, if any laws were applicable, seawalls and levees – and the streets, buildings, naval facilities and airport runways behind them – have been excluded from the concept of "navigable waters of the United States." The result has been that no approval of the Corps of Engineers under Section 10 of the Rivers and Harbors Act of 1899 ("RHA"), 33 U.S.C. § 403, has been required to resurface an airport runway, to fill a sinkhole in a city street on the San Francisco waterfront, or to install new dockside buildings on a Navy base. It ought to go without saying that those streets, runways and buildings, and the seawalls protecting them, remain as lawful as when they were built.

The decision below will change all that, at a minimum in the States and Territories of the Ninth Circuit, if allowed to stand. The decision first holds that the shoreline property boundary under federal common law is the mean high water (MHW) line where it would fall if seawalls, levees and fill were removed, and tidewater freed to flow inland. (Such a rule may suit the Government in this, the very rare case in which it owns not the coastal uplands, but the tidelands. In the usual case the Government owns the lands on the coast, and the State owns the adjacent tidelands.) The decision goes on to hold that the landward reach of the Rivers and Harbors Act is the very same line – the MHW line as it *would exist*, if protective works did not. The decision additionally holds that structures existing in this new, extended reach of "navigable waters," even if lawful when built, are now obstructions to navigable waters, are hence unlawful, and are thus subject to federal criminal charges, and civil lawsuits for abatement and of course for monetary penalties. 33 U.S.C. § 403a.

The mischief of the Ninth Circuit's opinion is manifest. But like the question where the full extent of the new federal jurisdiction lies – where would the new MHW line fall if all man's improvements were stripped away? – the full extent of the mischief is uncertain. The burden of the Ninth Circuit's opinion will fall equally on federal property managers (commanders of Navy and Air Force facilities, coastal wildlife-refuge managers) as it will on city officials, seaport and airport managers, not to mention private

landowners. That is because federal agencies must obtain approval under the Rivers and Harbors Act for work in "navigable waters" like anyone else. 33 CFR § 322.3(c). Moreover, the agency charged with administering the Rivers and Harbors Act, the U.S. Army Corps of Engineers, which was not a party to this case, will be burdened (in the region comprising the Ninth Circuit anyway) with the responsibility to regulate "work" in vast dry areas formerly beyond its purview.

To the extent that sea level continues to rise as it has over the last century (*e.g.*, 2 Shalowitz, *Shore and Sea Boundaries* (1964) 262, n. 81) or rises even faster and further as predicted by some (*e.g.*, Intergovernmental Panel on Climate Change, Climate Change 2007: Synthesis Report, Summary for Policymakers (2007) 6-12), the mischief worked by the Ninth Circuit's opinion will only multiply as the tides reach ever more shore defense structures lawfully built on dry land. The tides may be held back by those structures as intended and designed, but the Ninth Circuit's "legal" MHW line will penetrate through and beyond them as if they were not there, with the result that they and the lands and improvements they protect may be claimed by the adjoining tideland owners and may be deemed unlawful obstructions to navigation under the RHA.

More to the point, the opinion is wrong, and conflicts with decisions of this Court and at least one other circuit. A writ of certiorari will enable this Court to declare the nationwide limit of navigable

waters, a limit applicable in all circuits, and calm the welter of confusion that the opinion below is stirring.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND AT LEAST ONE OTHER COURT OF APPEALS, AND IS ERRONEOUS

A. The Rule Announced by the Ninth Circuit – That Under Federal Common Law the Coastal Boundary of Property Is the Mean High Water Line Where It Would Lie If Seawalls and the Like Were Imagined Away – Conflicts With a 1982 Decision of This Court and Is Wrong

The Ninth Circuit in its opinion below took up the trespass claim first, and held that federal common law, not state law, supplied the elements of the federal tort of trespass. The Court then moved on to discuss the law of waterfront boundaries, presumably of the view that federal common law likewise supplied the rule of decision of this property-law question.[2]

[2] The Court below never squarely addressed the latter choice-of-law question, the property-boundary question, though at one point it cited *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973) for a proposition, noting in its next breath that *Bonelli* was overruled in *Oregon ex rel. State Land Bd. v. Corvallis Sand*

(Continued on following page)

For reasons that are less than clear from the opinion below, the Ninth Circuit found as fact that, if the seawall in question were removed, the MHW line would encroach far inland of the seawall's position. (The seawall had been constructed landward of the MHW line, but erosion of the coastal land brought the MHW line to the face of the wall. The Court apparently presumed the erosive process of the waters of Georgia Strait would continue inland unabated; either that, or that the land behind the seawall had subsided.) The question then was whether the real MHW line or a hypothetical one was the property boundary. The Ninth Circuit could produce no law on point, and so felt free to develop a rule of federal common law on the question. It did so by first describing a common-law "vested right" of the tideland owner to additions to his tidelands if erosion of the shoreline occurred. *United States v. Milner*, 583 F.3d 1174, 1191 (9th Cir. Wash. 2009), Pet. App. 19-24. It summarized its brief analysis of this convoluted subject[3] in this terse paragraph:

& Gravel Co., 429 U.S. 363, 368-370 (1977). Pet. App. 22. The holding of *Bonelli* was that federal common law governed waterfront boundary cases between a state and private owner. *Corvallis*, decided three years later, overruled *Bonelli* and held state law governed.

[3] This Court's jurisprudence on the subject is considerable, as are the writings of scholars. *See, e.g.*, Angell, *A Treatise on the Right of Property in Tide Waters* (2d ed. 1847) 249-251; Hall, *A History of the Foreshore and the Law Relating Thereto* (3d [Stuart Moore] ed. 1888) 395, 785-789; Lemmon, *Public Rights in the Seashore* (1932) 20-27.

> By this logic, both the tideland owner and the upland owner have a right to an ambulatory boundary, and each has a vested right in the potential gains that accrue from the movement of the boundary line. The relationship between the tideland and upland owners is reciprocal: any loss experienced by one is a gain made by the other, and it would be inherently unfair to the tideland owner to privilege the forces of accretion over those of erosion. Indeed, the fairness rationale underlying courts' adoption of the rule of accretion assumes that uplands already are subject to erosion for which the owner otherwise has no remedy.

Pet. App. 22. To protect this right, the Court wrote, its new rule was necessary, adding that the result "quickly follows." Pet. App. 29.

But the Ninth Circuit's result does not follow, much less "quickly." In fact its new rule of federal common law, that an imaginary MHW line far landward of the actual MHW line is the property boundary, conflicts with this Court's decision in *Cal. ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 278-285 (1982).

In that case, the property ownerships formed a mirror image of those in this case. This is the unusual case, with the Federal Government owning the tidelands (in trust for the Lummis) and other parties owning the uplands. *Cal. ex rel. State Lands Comm'n* presented the far more common case calling for

application of federal common law to the shoreline-boundary question: The Federal Government owned the upland (a Coast Guard station), and the State owned the tideland. Substantial "artificial" land formed along the shoreline of the federal installation, and California claimed to own that land. California's position was that the MHW line must be regarded as if the "artificial" land did not exist. California's position was in this respect precisely the position taken by the Government, and adopted by the Ninth Circuit, below.

But this Court in 1982 rejected California's assertion, and held that the Federal title extended to the actual MHW line, not some hypothetical one. *Id.* at 288. If the proper rule is that the actual MHW line is the boundary when artificial land forms on the shoreline, not some hypothetically generated line, with all the more reason that ought to be the rule when the erosion of a shoreline is arrested by a lawfully built protective structure.

B. At Least One Other Circuit Holds That the Reach of the Rivers and Harbors Act Extends Landward to the Actual Mean High Water Line, Not a Hypothetical One, Where Structures Constraining the Incursion of Waters Were Built Lawfully. The Ninth Circuit's Decision Is in Conflict

The Ninth Circuit next took up the question of the landward reach of the Rivers and Harbors Act of 1899. With no analytical difficulty the Court held that

the reach of the RHA extended to the same line as the new shoreline property boundary the Court had just announced – the MHW line as it would exist if shore-protection works such as seawalls, levees and fill were imagined away. The result of the Court's decision, as the Court itself observed, is that such works are now unlawful structures. Pet. App. 31.

The Ninth Circuit's decision conflicts with a decision of the Third Circuit. In *United States v. Stoeco Homes, Inc.*, 498 F.2d 597 (3d Cir. N.J. 1974), the Third Circuit considered whether a Section 10 permit was required for work on land that had once been marsh, but had been lawfully filled decades earlier. The Government there argued that a permit was required because the filled land had once been below the MHW line. The Government's argument was the one it, 35 years later, made to the Ninth Circuit in this case – that one must imagine the fill removed, and the MHW line that would result was the landward reach of "navigable waters" under the Rivers and Harbors Act. The Ninth Circuit accepted the argument.

The Third Circuit in *Stoeco Homes*, however, found in the argument nothing of merit. It observed that much of the eastern seaboard had been lawfully built on fill and that, if the Rivers and Harbors Act applied as the Government urged, it would "apply as well to thousands of acres of streets, homesites, factory sites and railyards." *Id.* at 608. The court held that the Rivers and Harbors Act did not apply to property that, but for fill that was lawful when built,

would lie below the MHW line. *Id.* at 611. The Corps could not now require a permit, the Court held, after having long acquiesced in the fill. *Id.* To hold otherwise would be to "cast doubt upon the property status of thousands of acres of former tidal marshes," and, in the Court's words, "present problems" under the Due Process and Takings Clauses of the Fifth Amendment. *Id.*

C. Under the Ninth Circuit Decision, Vast Reaches of Dry Land and Landside Facilities of the Seaports, Airports, and Army and Navy Installations Lying Behind Seawalls and Levees Will, Nonetheless, Lie Within "Navigable Waters" and Require Federal Approval Under the Rivers and Harbors Act – a Result Congress Could Not Have Intended

The Ninth Circuit, apparently piqued at the homeowners for not settling with the Lummis and Federal Government, Pet. App. 27-28, 44, added to the homeowners' injury by holding that the seawall, lawful when built, had become unlawful by the action of tide and time. Pet. App. 29. One may argue whether such a result is an appropriate punitive measure in this case. But the ramifications of such a decision went unheeded.

Seaports are conventionally built by diking off shallow lands out to deep water, and filling behind them, as along the East River, or the Houston Ship

Channel. Two principal purposes are served by this "reclamation" – water deep enough to accommodate ocean-going vessels is reached, and mudflats are reclaimed to serve as quays, docking facilities, and platforms for container cranes. (Today's largest container vessels draw as much as 50 feet of water.[4]) Commercial airports in coastal areas are largely built as well on diked-off land. That is the case with the San Francisco International Airport, the Oakland International Airport, and many others. Numerous military facilities were likewise built in this way. In San Francisco Bay alone, Mare Island Naval Shipyard, Treasure Island Naval Base, Hunters Point Naval Shipyard, and Alameda Naval Air Station, to name just a few military facilities, were built on land reclaimed by diking off the waters of the Bay. Nothing in the Ninth Circuit's opinion confines its holding (that structures built where waters would flow, were it not for shore-protective works, are unlawful) to the peculiar facts of the case. And so, presumably, the levees and seawalls of these seaports, airports and military installations, and the warehouses and hangars behind them, are now unlawful obstructions to navigation subject to actions to require their removal, for monetary penalties, or worse. 33 U.S.C. § 403a.

Many of these military installations have been converted to civilian uses. The former Hamilton

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[4] The *Emma Maersk* has a draft of 15.5 meters, for example. http://www.emma-maersk.info.

Air Force Base in northern San Francisco Bay, for example, is now the site of a new community that is home to thousands of residents. Under the Ninth Circuit's ruling, the homes of these people, and the streets and sidewalks and parks built for their use and enjoyment, are unlawful obstructions to navigation, because were the protective seawalls removed, all would be under water.

One would like to think the Ninth Circuit was oblivious to these ramifications of its opinion. But the Court had before it a map, prepared in 1959 by the Department of Commerce for the Corps of Engineers and published as part of a well-circulated study in 1959, that shows in bold colors the areas of San Francisco Bay reclaimed by diking and filling since 1850. [5] The map is the Government's own pictorial representation of the extent that San Francisco Bay had been diked off to create dry land by 1959. It shows the extensive diked-off lands that created the Oakland and San Francisco airports, Treasure Island, the Port of Oakland, and much more. It also shows that the Financial District of San Francisco is built on such land. The Bank of America Building just

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[5] The map, entitled "Historical Development of Reclaimed Land 1850-1958," is Plate 19, Sheet 2 of 2, in *Future Development of the San Francisco Bay Area, 1960-2020*: Economic Aspects of Comprehensive Survey of San Francisco Bay and Tributaries, prepared for U.S. Army Engineer District, San Francisco, Corps of Engineers by U.S. Dept. of Commerce (1959). The map is Appendix 10 to the brief of the Bay Planning Coalition filed as amicus curiae in the court below.

misses lying within Corps jurisdiction under the Ninth Circuit's ruling. But the Transamerica Pyramid is built on reclaimed land, as are dozens of other skyscrapers, and all of San Francisco's Embarcadero Center. Like the seawall that protects them, they are presumably unlawful obstructions to navigation under Section 10, according to the Ninth Circuit. In this area ("area" being necessarily quite general, for tracing the line where tides would flow were the seawalls and other works removed will be tricky), new construction likewise would require a Section 10 permit, as would, presumably, routine maintenance such as pothole repair.

At bottom the Section 10 question must be: What did Congress intend? No Congress, not in 1899, not ever, could have intended such a result.

II. THE ISSUES ADDRESSED IN THE NINTH CIRCUIT DECISION ARE OF SUBSTANTIAL IMPORTANCE TO AMERICA'S PORT OPERATORS AND OTHER SHORESIDE PROPERTY OWNERS – INCLUDING FEDERAL AGENCIES, WHO LIKE OTHER WATERFRONT PROPERTY OWNERS MUST OBTAIN PERMITS FROM THE CORPS FOR WORK IN "NAVIGABLE WATERS"

The importance of the issues decided by the Ninth Circuit to many members of the California Building Industry Association and of the Bay Planning Coalition – an organization of cities, the ports of

San Francisco Bay, and other shoreside property owners – should require little elaboration. The seaport and airport operators now find that most if not all of their facilities, wet and dry, are in "navigable waters"; that work within them requires federal permits never required before, and that much if not all of the structures are now deemed unlawful. The Ninth Circuit was chillingly clear:

> [W]e have interpreted the RHA as making unlawful the failure to remove structures prohibited by § 10 [that is, those that exist where waters would flow were seawalls and the like removed], even if they were previously legal.

Pet. App. 31.

Maybe the Corps will develop and propose a new "master permit," applicable just to the States and Territories of the Ninth Circuit, one that would attempt to legalize existing structures. The proposal of such a master permit, though, would likely be delayed for years by litigation brought by anti-development organizations. The ultimate promulgation of such a remedy, even assuming the Corps had the political will to try it, is far from a certain thing.

What of the ability of affected shoreline property owners within the Ninth Circuit to develop their properties? Take properties on Sansome or Battery Streets in San Francisco's Financial District. That District was, before it was reclaimed (lawfully, we should note, though that is irrelevant under the

Ninth Circuit's opinion), a bay within San Francisco Bay known as Yerba Buena Cove. Such development will require either the approval of Congress or Corps permits under Section 10, according to the Ninth Circuit's opinion. But what of the owners' ability to borrow for the construction? What knowledgeable lender would lend beneath such a cloud?

What of the ability of seaport and airport authorities to modernize or expand their facilities? Major infrastructure projects at airports and seaports can cost billions of dollars. Aside from the presumed need to obtain federal permission for new marine terminals, hangars, runways and the like, there is the need to borrow money by issuing bonds. What apprehensions will the bond underwriters have for public projects in the shorelines of the Ninth Circuit?

Finally, what of the impact to the Federal Government? The commanders of coastside military bases (consider just the Navy installations in the harbors of Puget Sound, San Diego and San Pedro Bays, Guam and Hawaii) preside over tens of thousands of acres of dry lands that will now be regulated under Section 10 as "navigable waters of the United States," with all that that entails (the need for permits, the specter that much of the facilities are "unlawful").

Those are impacts to the federal agencies that will now be regulated under the Ninth Circuit's view of the reach of Section 10. But some federal agency must do the regulating, and that agency is the Corps

(except when Congress steps in, as under the first clause of Section 10). Is the Corps prepared to assume these vast new permitting – and enforcement – responsibilities in the Ninth Judicial Circuit? We do not know whether the federal attorneys below, who advanced the arguments embraced by the Ninth Circuit, conferred beforehand with the Assistant Secretary of the Army for Civil Works or the Chief of Engineers. But in light of the extraordinary reach of the decision below, it is hoped the Solicitor General will now.

CONCLUSION

The writ of certiorari should issue to the Ninth Circuit Court of Appeals.

Respectfully submitted,

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No. 09-820

In the
Supreme Court of the United States

MARY D. SHARP,

Petitioner,

v.

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, and THE LUMMI NATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND THE WASHINGTON STATE FARM BUREAU IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the common law doctrine of accretion and erosion limits a tideland owner's right to claim title to upland property to land that has either actually eroded or is actually submerged beneath tidal waters?

2. Whether, under federal property law, the existence of a lawful, man made structure that stops the tide from overflowing or eroding upland property establishes the boundary between the tideland and upland?

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation and the Washington Farm Bureau submit this brief amicus curiae in support of Petitioner Mary D. Sharp.[1]

Pacific Legal Foundation (PLF) was founded over 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has participated in numerous cases before this Court both as counsel for parties and as amicus curiae. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys participated as lead counsel in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and participated as amicus curiae in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). Because of its history and experience with regard to issues affecting private property, PLF believes that its

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

perspective will aid this Court in considering the petition.

The Washington Farm Bureau (WFB) is an organization based in Washington state comprised of more than 38,000 active member families. WFB is organized to speak out on issues of concern to rural America. Formed in 1920, as a part of the American Farm Bureau Federation, WFB is the largest trade association in Washington. Because many WFB members make their living by cultivating crops on their land, the organization is concerned about economic issues surrounding land use and property rights law in Washington. Washington's agricultural industry under normal conditions is an industry with low profit margins. Limitations on property rights, especially in areas designated for agricultural use, increase production costs and further lower profit margins and the viability of WFB members' businesses. WFB takes particular interest in the outcome of this case due to the impact that the Court's decision could have on the viability of commercial agricultural land in Western Washington.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision created a new rule of federal property law, holding that an owner of tideland property has "a vested right in the potential gains" resulting from the unimpeded erosion of upland property. *United States v. Milner*, 583 F.3d 1174, 1188 (9th Cir. 2009). The Ninth Circuit determined that this newly adopted property right was superior to the upland property owners' right to protect their property from erosion. *Id.* at 1189-90. Thus, the Ninth Circuit concluded that the coastal property owners had trespassed on the "interest in the neighboring

tidelands" by maintaining lawful shore defense structures on their own property, and ordered the upland property owners to remove the shore defense structures. *Id.* at 1189-90.

The Ninth Circuit's decision is particularly objectionable—and particularly appropriate for review—because it departs from long-standing common law rules. In particular, it conflicts with the doctrines of accretion and erosion, which preserve dry land that is not reached by the tides for use by the upland owner, common law rules that allow property owners to protect their land, and violates this Court's policy of avoiding rules that would unsettle titles. Amici urge this Court to grant the petition to reaffirm the principle that an upland property owner has the right to protect her land from erosion and retains title to all land not actually submerged by tidal waters.

The decision will have profound impacts locally and nationally. This case is of particular importance to agriculture in Washington's Skagit Valley, which produces hundreds of millions of dollars of revenue annually and provides thousands of jobs. A third of this agricultural land is dependent on shore defense structures like dikes and tide gates which keep salt water from inundating the fields. The livelihood of many Washington families depend on the agricultural industry. However, this case is not just a parochial matter. If left unreviewed, the Ninth Circuit's rule has the capacity to unsettle the expectations of shoreline property owners across the nation. This Court's review is necessary to prevent the potential upheaval of shoreline property rights.

ARGUMENT

Coastal shorelines move. *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 189 (1890). Based on a variety of conditions, shoreline property can grow, shrink, or remain stable for periods of time. *Borax Consolidated Ltd. v. City of Los Angeles*, 296 U.S. 10, 11-18 (1935). The common law, as interpreted and applied by our courts, has dealt with the changing conditions on shorelines in a remarkably consistent manner. *County of St. Clair v. Lovingston*, 90 U.S. (23 Wall) 46, 66-68 (1874). Put simply, the boundary between the generally public tideland and private uplands advances or retreats along with gradual changes to the shoreline. *Id.* at 67.

The purpose of this doctrine is to provide stability to shoreline property rights. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 382 (1977). The doctrine assists courts in determining what constitutes upland property (land that is "'dry and maniorable,' that is, not reached by the tides") and what constitutes the tideland ("land over which the daily tides ebb and flow"). *Borax*, 296 U.S. at 22-24 (quoting Lord M. Hale, *De Jure Maris et Brachiorum ejusdem*, cap. vi (1667)). Until the Ninth Circuit's decision, this rule has had the benefit of "uniformity and certainty, and . . . eas[e] of application." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 481 (1988) (quoting *Cobb v. Davenport*, 32 N.J.L. 369, 7 (1867)).

However, in *Milner*, the Ninth Circuit abandoned the common law's distinction between dry and wet land, adopting a new rule that awards the tideland owner title to all upland property that could potentially be eroded or overflowed in the future. *Milner*, 583 F.3d at 1189-90. Applying this new rule, the Ninth Circuit

held that a shore defense structure that was lawfully constructed on upland property and doing precisely what it was designed to do—protecting upland property from erosion—trespassed on the tideland owner's right to all upland property that could erode if the shoreline was left in a natural, undeveloped state. *Id.* at 1189-90. This decision raises an important issue of federal common law property rights because it threatens to unsettle the rights of shoreline property owners across the nation and departs from federal common law.

I

THE NINTH CIRCUIT'S DECISION RAISES AN IMPORTANT ISSUE BECAUSE IT THREATENS SHORELINE PROPERTY ACROSS THE NATION

Reduced to its core, the Ninth Circuit's decision holds that a tideland owner has a right to force a shoreline property owner to remove any structure that impedes the flow of water over the uplands. This rule has broad and untenable consequences. It exposes countless tracts of private shoreline property across the nation to erosion and inundation of tidal waters. Most immediately threatened is valuable and traditional farmland in Skagit Valley in Western Washington. Indeed, the decision threatens to upset (previously) well-settled shoreline property rules nationwide because state courts regularly look to the federal common law for guidance on the rights of shoreline property owners.

A. The Ninth Circuit's Decision Threatens To Expose Private Property to Erosion and Inundation

The Ninth Circuit's decision allowing tribal tideland owners to remove private erosion barriers poses a clear and present danger to one of the most productive agricultural areas in Western Washington—the Skagit Valley. Prior to western settlement, the deltas and floodplains of the Skagit and Samish Rivers of the Skagit Valley were ill-suited for agriculture. Although the valley was extremely fertile, saltwater intrusion rendered the soil unusable for nearly all crops.[2] In the mid-1800s, settlers began clearing and draining the lowlands and constructing dikes to protect the newly created agricultural land.[3] By 1884, the settlers constructed 150 miles of dikes along the seaward edge of the delta to prevent saltwater intrusion, and a system of tide gates, sloughs, and pumps to drain high volumes of surface water that accumulated behind the dikes.[4] This infrastructure continues to provide desperately needed flood control to protect the region's commercial agriculture.

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[2] *See* Skagit County Planning and Permitting Center, Draft Programmatic Environmental Impact Statement: Development of a Critical Areas Ordinance for Application to Designated Agricultural Natural Resources Lands (Ag-NRL) and Rural Resource Natural Resource Lands (Rrc-NRL) Engaged in Ongoing Agricultural Activity, Volume 1 at 5-13 (Skagit County, Wash. Feb. 2003) (Skagit Draft EIS).

[3] Skagit Draft EIS, Volume I at 6-2-5.

[4] Skagit Draft EIS, Volume I at 6-3.

Currently, the Skagit Valley contains over 700 farms on 93,000 acres of arable land.[5] The region's agriculture contributes significantly to Washington State's economy. Skagit County is the second most productive agricultural county in Western Washington with revenues of approximately $256 million. *See* U.S. Department of Agriculture 2007 Census, Skagit County.[6] The industry also generates over $143 million in secondary revenue through related industries and agritourism, such as the Tulip Festival, Harvest Celebration, and County Fair.[7] County agriculture directly employs over 3,300 individuals and supports secondary employment of 2,350 for a total of 5,650 jobs.[8] The importance of these jobs is underscored by the fact that this employment represents 8% of the entire County workforce, which is 5% higher than the same measure for Washington State as a whole.[9] But continued production in the valley depends on the network of dikes and drains. *Swinomish Indian Tribal Cmty. v. W. Washington Growth Mgmt. Hearings Bd.*, 166 P.3d 1198, 1204 (Wash. 2007).

Not everyone applauds the Skagit Valley agricultural system. Swinomish tribal interests have

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[5] Skagit Draft EIS, Volume I at 6-2.

[6] *Available at* http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/County_Profiles/Washington/cp53057.pdf (last visited Feb. 4, 2010).

[7] Skagit Draft EIS, Volume I at 4-3-4.

[8] Skagit Draft EIS, Volume I at 4-3-4.

[9] Skagit Draft EIS, Volume I at 4-3.

targeted the valley's agricultural lands for litigation, with the goal of removing dikes and tide gates to restore the area to its pre-settlement condition. If they were to succeed, approximately a third of this land (30,000 acres) could be inundated at high tide.[10]

From 2002 to 2007, the Swinomish unsuccessfully used Washington's growth management appeals process to try to force Skagit Valley farmers to return productive agricultural land to its pre-settlement condition. *Id.* at 1206. Then, in 2008, the Swinomish Tribe filed a lawsuit with the Federal District Court for the Western District of Washington alleging that the County's repair of three failing tide gates violated the Clean Water Act and Endangered Species Act. *Swinomish Indian Tribal Cmty. v. Skagit County Dike Dist. No. 22*, 618 F. Supp. 2d 1262 (W.D. Wash. 2008). The district court granted summary judgment in favor of the tribe, *id.* at 1271, after which the County settled the case by agreeing to remove the tide gates and allow 400 acres of private agricultural land to be inundated by sea water.

The Ninth Circuit's decision provides a new and potent weapon for tribal forces who would like to see agriculture end in the rest of the Skagit Valley. The 1855 Treaty of Point Elliott, Jan. 22, 1955, 12 Stat. 927, reserved to certain Washington tribes, including the Lummi and Swinomish, the right to fish in their "usual and accustomed grounds and stations."[11]

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[10] Skagit Draft EIS, Volume I at 5-13.

[11] Amici Curiae agree with Petitioner's argument that the Ninth Circuit erred in concluding that under the "equal footing doctrine" the federal government reserved ownership of the tidelands in

(continued...)

Milner, 583 F.3d at 1184. The Swinomish Tribe's usual and accustomed fishing grounds includes the Skagit River and its tributaries. *United States v. Washington*, 459 F. Supp. 1020, 1049 (W.D. Wash. 1978). Thus, when the Ninth Circuit concluded that "possession of the tidelands was 'a necessary prerequisite to the enjoyment of fishing,'" *Milner*, 583 F.3d at 1184 (quoting *United States v. Stotts*, 49 F.2d 619, 620-21 (W.D. Wash. 1930)), it opened the door for the Swinomish to assert "a vested right in the potential gains" of up to 30,000 acres of Skagit Valley farmland that would result from removal of farmers' dikes, culverts, and tide gates. *Milner*, 583 F.3d at 1188. The Court should grant review to address the important question as to whether tideland owners have a right to dismantle vital levee systems so as to allow the tide to flow in, and increase their own area of control.

B. The Ninth Circuit's Decision Will Expose Coastal Property Owners to Lawsuits Seeking To Upset Previously Settled Rights Under State Law

The impact of the Ninth Circuit's decision is not limited to Washington. It threatens to undermine shoreline private property established and existing nationwide under previously well-settled state law. Major urban centers across the nation, such as

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[11] (...continued)
trust for the Lummi Tribe. If the decision is not reviewed, this conclusion will support a Swinomish claim to private agricultural property protected by dikes and tide gates.

New Orleans,[12] Seattle,[13] and San Jose,[14] for example, are protected from erosion and inundation by a system of levees and seawalls. Under the Ninth Circuit's rule, tideland owners—whether tribal or public—could demand removal of such defense structures so as to allow the tide to migrate freely.

The foundation for such an attack on coastal private property is already in place. For years, legal commentators have argued for a change in the law that would allow citizen suits under the doctrine of accretion and erosion or the public trust doctrine to force property owners to remove lawful shore defense structures. *See, e.g.*, Benjamin Longstreth, *Protecting "The Wastes of the Foreshore": The Federal Navigational Servitude and its Origins in State Public Trust Doctrine*, 102 Colum. L. Rev. 471, 496-500 (2002) (proposing that the federal navigational servitude may be used to impose environmental conditions on private

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[12] *See* Laurie A. Morin, *A Tale of Two Cities: Lessons Learned from New Orleans to the District of Columbia for the Protection of Vulnerable Populations From the Consequences of Disaster*, 12 U. D.C. L. Rev. 45, 50 (2009) (New Orleans is shaped like a bowl with elevations ranging from 12 feet above sea level to 9 feet below.).

[13] S.L. Kramer & M.O. Eberhard, *Seismic Vulnerability of the Alaskan Way Viaduct: Summary Report* at 2 (prepared for Washington State Dept. Of Transportation and U.S. Dept. Of Transportation July 1995). *Available at* http://www.wadot.wa.gov/NR/rdonlyres/6399A235-8AC2-453B-A1EF-4CE55F4AFFEC/0/SeismicVulnerabilityoftheViaduct_TRAC_July1995.pdf (last viewed Feb. 4, 2010).

[14] United States Department of the Interior, United States Geological Survey, *Delta Subsidence in California, The Sinking Heart of the State* (USGS, FS-005-00 April, 2000). *Available at* http://ca.water.usgs.gov/archive/reports/fs00500/fs00500.pdf (last viewed Feb. 4, 2010).

shoreline property); James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 Md. L. Rev. 1279, 1361-84 (1998) (proposing that the public trust be used to impose a rolling easement that would move with the extent of the high water mark, forcing property owners to remove bulkheads when the tide intersects with them). Until now, however, anti-seawall forces had no concrete legal mechanism to anchor their crusade.

The Ninth Circuit's published decision provides that mechanism. Although the decision is one of federal law, this will not limit its practical scope because state courts often follow federal common law in demarcating the relative rights and obligations of tideland and upland private property owners. *See, e.g.*, *Brainard v. State*, 12 S.W.3d 6, 17-19 (Tex. 1999); *State of California ex rel. State Lands Comm'n v. Superior Court*, 900 P.2d 648, 656 (Cal. 1995); *Borough of Wildwood Crest v. Masciarella*, 240 A.2d 665, 668-69 (N.J. 1968). Thus, the Ninth Circuit's recognition of a right in tideland owners to the uninterrupted migration of the tide gives advocates of coastal "retreat"—removal of private coastal structures—a ready vehicle to wage a litigation campaign to force shoreline property owners to remove functioning and effective shore defense works from the shoreline.

This threat is not hypothetical. In *Phillips Petroleum*, this Court concluded that Mississippi owned all the land under nonnavigable tidal waters, which meant that its tidelands were subject to the public trust doctrine. *Phillips Petroleum*, 484 U.S. at 476, 479-80. The decision authorized states to break a chain of title that granted upland property owners a

right to nonnavigable tidelands. *Id.* at 485 (O'Connor, J. dissenting). Justice O'Connor, joined by Justice Stevens and Justice Scalia, expressed concern over the "grave injustice to be done to innocent property holders in coastal States." *Id.* at 494. While it was not clear how many property owners would actually be targeted for litigation, Justice O'Connor noted that New Jersey's adoption of an expanded definition of public trust resulted in the state claiming title to hundreds of properties. *Id.* at 493 (O'Connor, J. dissenting).

> "Due to this attempted expansion of the [public trust] doctrine, hundreds of properties in New Jersey have been taken and used for state purposes without compensating the record owners or lien holders; prior homeowners of many years are being threatened with loss of title; prior grants and state deeds area being ignored; properties are being arbitrarily claimed and conveyed by the State to persons other than the record owners; and hundreds of cases remain pending and untried before the state courts awaiting processing with the National Resource Council."

Id. at 493 (quoting Alfred A. Porro, Jr. & Lorraine S. Teleky, *Marshland Title Dilemma: A Tidal Phenomenon*, 3 Seton Hall L. Rev. 323, 325-26 (1972)).

The Ninth Circuit's decision—covering the coastal states of California, Oregon, Washington, and Hawaii —poses an even greater threat to private property. Any shoreline areas governed by federal common law (or state law following it) are now subject to the right of tideland owners to demand destruction of lawful, pre-existing protective barriers so that the tide can

flow inland and they can acquire title over new areas. The decision therefore raises an important issue worthy of this Court's review.

II

THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE FEDERAL COMMON LAW OF SHORELINE OWNERSHIP, AS ARTICULATED BY THIS COURT

A. The Ninth Circuit's Recognition of a Right in Tideland Owners To Acquire All Land That Would Be Touched by an Unimpeded Tidal Flow Is Inconsistent with the Common Law

The Ninth Circuit claimed that its decision—giving a tideland owner a vested property interest in the unimpeded erosion of upland property—stemmed from a need to recognize a reciprocal right in the tideland owner equivalent to the upland owner's right to accretion. *Milner*, 583 F.3d at 1189-90. Accretion, of course, allows the owner of property upland of the waterline to acquire new land when the tide recedes toward the sea. The Ninth Circuit apparently believed the federal common law authorized it to categorically enforce a converse principle; *i.e*, that a tideland owner has a per se right to gain title over any uplands that might be touched by the tide if there were no barriers. *Id.* at 1189-80. But there is no basis for this in the federal common law.

The Ninth Circuit purported to derive its decision from language in *County of St. Clair* stating that "[t]he

riparian right to future alluvion[15] is a vested right." This, the Ninth Circuit claimed, gave rise to a correlative "vested" right in tideland owners to future tideland "gains" caused by unimpeded erosion. *Milner*, 583 F.3d at 1187-88 (citing *County of St. Clair*, 90 U.S. (23 Wall) at 66-68).

But, when read in context, *County of St. Clair* offers no support for the Ninth Circuit's decision. In *County of St. Clair*, the U.S. government awarded veterans three 100-acre militia tracts which bordered the Mississippi River on the west. *Id.* at 48-51. The grants designated the river bank as the waterward boundary of the parcels. *Id.* at 48-51. Over time, substantial land accumulated due to accretion on the river bank resulting from dikes that had been constructed upriver, and the County of St. Clair brought suit, claiming title to the newly formed land. *Id.*, at 51-52. The question presented asked whether a riparian property owner had title to alluvial soil. *Id.* at 68. And on this issue, the Court held that it was immaterial whether a man-made structure caused the shoreline to advance, retreat, or remain the same:

> If there be a gradual loss, [the riparian owner] must bear it; if, a gradual gain, it is his. The principle applies alike to streams that do, and to those that do not overflow their banks, and where [dikes] and other [defenses] are, and where they are not, necessary to keep the water within its proper limits.

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[15] Alluvium (or alluvion) is material, such as clay, silt, or gravel, that is deposited by running water. *Black's Law Dictionary* 77 (7th ed. 1999).

Id. at 69; *see also id.* at 66 ("Whether the flow of the water was natural or affected by artificial means is immaterial."). The Court stated that, when accretion occurs, "[t]he riparian right to future alluvion is a vested right." *Id.* at 68. Thus, what *County of St. Clair* holds is that actual, existing conditions on the shoreline—natural or man-made—determine the property boundary.

The Ninth Circuit read *County of St. Clair* to create a new right that gives the upland property owner title to all *potential future* accretion, not just existing accretion. *Milner*, 583 F.3d at 1189-90. According to the Ninth Circuit, this new right to future accretion includes a right to demand that the shoreline be kept in a natural state, free of any artificial shore defense structures on neighboring tracts, in order to maximize the potential benefits to his own property. *Id.* at 1189-90. Whatever else can be said about this rule, it does not arise from this Court's decision in *County of St. Clair*. *See Western Pac. Ry. Co. v. Southern Pac. Co.*, 151 F. 376, 398-99 (9th Cir. 1907) ("The controversy in [*St. Clair County*] did not even remotely relate to the right to future alluvion, but related only to alluvion then existing. We cannot think that the court meant to announce the doctrine that the right to alluvion becomes a vested right before such alluvion actually exists."); *Humble Oil & Refining Co. v. Sun Oil Co.*, 190 F.2d 191, 194 (5th Cir. 1951) (At common law, "no riparian owner has a vested right in the general law of accretion, except as to the alluvion that was added to the shore[.]"). The Ninth Circuit's adoption of a vested right to any potential future gains resulting from the unimpeded erosion of upland property conflicts with the common law, as articulated by *County of St. Clair* and progeny. Thus,

Milner effectively created a new rule of federal property law which should be reviewed by this Court.

B. The Ninth Circuit's Decision Is Inconsistent with the Common Law Because It Eviscerates a Landowner's Right To Protect Her Property from Erosion

The Ninth Circuit's decision is inconsistent with common law principles not only in holding that a tideland owner has a right to future erosion, but also in failing to uphold the right to protect private property. The Ninth Circuit did recognize that the common law grants a coastal property owner "the right to build on their property and to erect structures to defend against erosion and storm damage," subject to reasonable regulation. *Milner*, 583 F.3d at 1189. But it then proceeded to eviscerate that right by holding that a shoreline property owner could not interfere with a tideland owner's newly created right to the unimpeded erosion of neighboring upland property. *Id.* at 1189-90. This decision conflicts with rules allowing riparian property owners to maintain their dry land by erecting structures halting the tides.

1. The General Right To Protect Private Property from Erosion and Overflow Is Well-Settled

It is well established that, under the common law, a property owner has a right to defend his property against the elements. *See Cubbins v. Mississippi River Comm'n*, 241 U.S. 351, 363-64 (1916) (It is "universally recognized" that the common law entitles shoreline owners "to construct works for their own protection."); Joseph J. Kalo, *North Carolina Oceanfront Property and Public Waters and Beaches: the Rights of Littoral Owners in the Twenty-First Century*, 83 N.C. L. Rev. 1427, 1490 (2005) (At common law, "[e]ach landowner had the right to erect structures to protect her land from the ravages of the sea[.]"). And there is nothing in the common law suggesting that this right is inferior to a neighboring property owner's right to gains (through erosion or accretion) against an abutting property. *Cubbins*, 241 U.S. at 364-65 (A property owner whose interest is affected by a lawful shore defense structure has "no cause of complaint."). To the contrary, the common law has always made the right to protect one's property from harm paramount. *Id*; *Pechacek v. Hightower*, 269 P.2d 342, 344 (Okla. 1954) (Riparian owner has the absolute right to construct necessary defense structures to maintain or restore a bank without liability to other riparian owners.); *Katenkamp v. Union Realty Co.*, 59 P.2d 473, 473-74 (Cal. 1936) (A coastal property owner has the right to erect reasonable defense structures to protect his land from inroads of the sea.); *Cass v. Dicks*, 44 P. 113, 115 (Wash. 1896) (A neighboring land owner has no right to prevent a property owner from constructing defense structures to protect his land from overflow). The Ninth Circuit reversed the traditional order, making

private property rights in productive uplands inferior to natural forces, like the tide.

2. A Shoreline Owner Is Entitled to Land Protected from Innundation and Erosion by Lawfully Constructed Defense Structures

The common law right to defend property from the tide entails a correlative right to own the dry land maintained by the shoreline defense structures—the very right the Ninth Circuit's decision has now repudiated in favor of perpetual erosion. Prior decisions, one early and one in the modern era, provide a good example of how this Court has rejected a tideland owner's claim to land that is protected from innundation by lawfully constructed defense structures.

First, the early case: *New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836). A large portion of New Orleans included lands made up of alluvion from the Mississippi River. *Id.* at 717. The city constructed levees to protect the land from being overflowed by the Mississippi. *Id.* at 717. If it were not for the levees, the City of New Orleans and much of the countryside would be submerged and uninhabitable. *Id.* at 717-18. The United States filed a petition claiming ownership of the alluvial lands. *Id.* at 663, 711. This Court rejected the United States' petition, holding that, as a riparian proprietor, New Orleans had a right to the gains in alluvial land resulting from its construction of levees. *Id.* at 718, 737. The fact that the levees were man-made structures had no impact on the Court's analysis.

But the Ninth Circuit has come to the opposite conclusion. It holds that the existence of protective structures divests the dry upland owner of any right to own the land kept dry by the structures.

Over a century after *County of St. Clair* and *New Orleans*, this Court reaffirmed the common law principle that a shoreline property owner is entitled to dry land created by a shore defense structure. In *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273 (1982), the United States, as the upland owner, erected a jetty off the coast of California that resulted in the creation of new land due to accretion. As the owner of the tidelands, California claimed title to the accreted land. This Court, however, concluded that as a matter of federal property law "accretions of *whatever cause* belong to the upland owner." *Id.* at 288 (emphasis added); *see also Alexander Hamilton Life Ins. Co. of America v. Gov't of the Virgin Islands of the United States*, 757 F.2d 534, 546 (3d Cir. 1985). The existence of an artificial shore defense structure was immaterial to the decision.

Both *New Orleans* and *California ex. rel. State Lands* show that a lawful shore defense structure is considered part of the actual, existing conditions of the shoreline. That is, such a structure—not hypothetical erosion—establishes the boundary of the tideland owner's interest. The common law simply does not grant a tideland owner an interest in the dry land that is created or protected by a shore defense structure. Instead, ownership of tidelands has always been limited to land that is actually beneath tidal waters. *See, e.g., Borax*, 296 U.S. at 22-23; *Appleby v. City of New York*, 271 U.S. 364, 381 (1926); *Shively v. Bowlby*, 152 U.S. 1, 57 (1894); *Illinois Central R. Co. v. Illinois*,

146 U.S. 387, 435 (1892); *Knight v. United Land Ass'n*, 142 U.S. 161, 183 (1891); *Hardin v. Jordan*, 140 U.S. 371, 381 (1891); *McReady v. Virginia*, 94 U.S. (4 Otto) 391, 394 (1876); *Weber v. Bd. of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 65 (1873); *Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471, 477-78 (1850).

The Ninth Circuit departed from the common law, as articulated by this Court, when it created a right that entitled tideland owners to force the removal of a lawful shore defense work for the sole purpose of expanding the reach of the tides.[16] This departure justifies this Court's plenary review.

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[16] The Ninth Circuit's new rule is also inconsistent with the recognized policy underlying the doctrine of accretion and erosion, which provides the upland property owner with the gains from accretion as *de minimis* reciprocal consideration for having to bear the burden of loss due to erosion or the cost of defending his property against erosion:

> And as to lands gained from the sea, either by alluvion, by the washing up of land and earth, so as in time to make terra firma, or by dereliction, as when the sea shrinks below the usual water-marks; in these cases the law is held that if the gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex*; and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss.

Blackstone, William, 2 Commentaries on the Laws of England, The Rights of Things (Oxford Claredon Press 1765-69) 261-62.

CONCLUSION

The Court should grant the Petition.

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